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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOHN R. CONNOR, Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
U. S. DEPARTMENT OF LABOR and
the BUREAU OF LABOR STATISTICS.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Due Process Clause requires confrontation and cross-examination of a government witness whose management decisions created the administrative basis for the removal of a federal employee and, if so, whether the denial of such procedural right is fatal to the proceeding.

   a. Whether the Agency correctly interpreted FPM Letter 630-29, governing the recordal of approved leave on a federal employee's official Time and Attendance Report.

2. Whether the Merit Systems Protection Board violated the Due Process Clause when its Presiding Official declined to decide a disputed, material question of law concerning whether a federal employee had correctly utilized negotiated grievance procedures in seeking review of two suspensions which were later used in determining a removal penalty.

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In the matter of:

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MERIT SYSTEMS PROTECTION BOARD,
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the BUREAU OF LABOR STATISTICS

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner John R. Connor hereby petitions for a writ of certiorari to review

the judgment of the United States Court of Appeals for the Federal Circuit in this case.

QUESTIONS PRESENTED

1. Whether the Due Process Clause requires confrontation and cross-examination of a government witness whose management decisions created the administrative basis for the removal of a federal employee and, if so, whether the denial of such procedural right is fatal to the proceeding.

   a. Whether the Agency correctly interpreted FPM Letter 630-29, governing the recordal of approved leave on a federal employee's official Time and Attendance Report.

2. Whether the Merit Systems Protection Board violated the Due Process Clause when its Presiding Official declined to decide a disputed, material question of law concerning whether a federal employee had correctly utilized negotiated grievance procedures in seeking review of two suspensions which were later used in determining a removal penalty.

PARTIES TO THE PROCEEDING ARE:

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* The Court of Appeals has consistently failed to list the MSPB as a respondent in this case while Petitioner's docketed Petition for Review and all filings have shown the MSPB as a party. The April 9, 1984 Final Order of the MSPB specifically stated Petitioner's right to seek judicial review arose "under 5 U.S.C. §7703" (App. B, infra, p. 56a), which statute makes the MSPB the respondent in this appeal. The MSPB, however, never moved to reform the caption and did not contest Petitioner's arguments in the Court of Appeals, albeit Petitioner unsuccessfully attempted to compel the agency's participation.

JURISDICTION

The Final Order of the Merit Systems Protection Board (MSPB) in this matter, entered on April 9, 1984 (App. B, infra, p. 55-57a) denied Petitioner's Petition for Review, whereupon the Initial Decision of the MSPB (App. A, infra, p. 1-54a) became final.

Petitioner timely filed a petition for judicial review with the Court of Appeals for the Federal Circuit, which affirmed the decision of the MSPB in an unpublished opinion issued February 22, 1985. (App. C, infra, p. 58-60a). A subsequent Petition for Rehearing and a Suggestion for Rehearing in banc were denied on April 5, 1985. (App. D, infra, p. 61a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The opinions herein are unreported.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> No person shall be * * * deprived of life, liberty or property, without due process of law * * *

5 U.S.C. §556(d) provides in part that:

> A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

5 U.S.C. §7121(e)(1) provides in part:

> Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both.[1]

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[1] 5 U.S.C. §7512 includes "a suspension for more than 14 days." 5 U.S.C. §7701 states: "An employee * * * may submit an appeal to the [MSPB] from any action which is appealable to the Board..."

5 U.S.C. §7703(c)(1) and (2) provide in part:

> In any case filed in the United States Court of Claims or a United States court of appeals, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be-
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed * * *

5 C.F.R. §1201.41(b) provides in part:

> Presiding officials shall conduct fair and impartial hearings * * *

5 C.F.R. §1201.111(b)(1) provides:

> Each initial decision shall contain: (1) Findings of fact and conclusions, as well as the reasons or bases therefor, upon all the material issues of fact and law presented in the record *

FPM Letter 630-29 provides in part:

> 3. Recording Leave. Irrespective of the type of written request or application for leave which is required, the recording of an absence in an approved category on an official time or attendance record upon which salary payments

> are made reflects approval of the absence. When leave has been requested, approved and used by an employee, retroactive substitution of one category of leave for another category may be made only under conditions of law or regulation which permit a change in statutory rights, e.g., an employee on approved annual leave becomes ill and upon return to duty requests substitution of sick leave for the annual leave (38 Comp. Gen. 354 and 5 CFR 630.405). An exception to this rule is the situation where it is subsequently established that the employee submitted fraudulent documentation or misrepresented either the time taken or the reason for the absence.

FPM Chapter 752, Subch. 3-3k(2) provides in part:

> A member of a bargaining unit under a negotiated agreement * * * has the choice of appealing to the Merit Systems Protection Board or filing a grievance under the negotiated grievance procedures * * * If the employee has both appeal and negotiated grievance rights, the agency must inform him or her of both.)

SYMBOLS

A = Appendix: Court of Appeals

E = Exhibits: Court of Appeals

T = Transcript: Court of Appeals (June 21 and 25, 1982)

STATEMENT

Petitioner was employed in Philadelphia with the U. S. Department of Labor's Bureau of Labor Statistics (BLS) as a Labor Economist (GS-11), with approximately 17 years of service, when he was terminated on March 5, 1982 as a result of an adverse action stemming from events surrounding Petitioner's alleged misuse of a GSA vehicle on December 14-15-16, 1981. In its decision opting for the removal penalty, the Agency relied on two prior suspensions of Petitioner (3 days in 1980 and 15 days in 1981) which are distinguishable from the GSA vehicle incident in December, 1981 - except to the extent that both suspensions and Petitioner's removal coincide with the appointment of one Frank J. Hayden as Petitioner's immediate supervisor.

At the time of the GSA car matter, Petitioner was serving as the BLS (Philadelphia) union steward for the National Council of Field Labor Locals (NCFLL), Local 644, and

since August, 1981, was deeply involved in two grievances filed against BLS Associate Regional Commissioner Irwin Feigenbaum by BLS employee Nancy Coleman. The essence of that acrimonious dispute concerned the grievant's complaint that she had been unlawfully reassigned from her position in the Wage Branch of the BLS to its Price Branch in the Philadelphia office (Grievance N° 1). However, the more immediate issue concerned Feigenbaum's use of a possibly fraudulent reassignment date on Coleman's reassignment papers (DL-50), which comprised Grievance N° 2. Although this second grievance was being handled the the local's president, Petitioner was constantly compelled to intervene in the process to ensure that the grievance did not fail for want of timely prosecution. On October 27, 1981 Petitioner wrote a letter to then-Secretary of Labor Raymond Donovan and advanced the argument (which was conspicuously absent from the union's filings) that the reassignment date on Coleman's DL-50 was fraudulent:

> I think that it should be made crystal-clear, so that there is no misunderstanding on this point, that Ms. Coleman's backdated reassignment date of August 9, 1981 - instead of the actual date of August 17, 1981 - not only violated FPM Supp. 296-31, V-69, Subtable 6, Inst. 78, issued June 27, 1980, but also legally constitutes fraud, in consequence whereof her reassignment is void per se.

(E 77E). On the morning of December 14, 1981, Petitioner received a certified letter which contained the Secretary's reply to Grievance N° 2, which upheld Feigenbaum's actions in reassigning Coleman. The issue of whether her DL-50 was fraudulent was ignored by the Secretary's Agent (Alfred M. Zuck) who stated that: "[t]he NCFLL may invoke arbitration within 15 work days from receipt of this letter in accordance with Article 16, Section 1 [of the NCFLL contract]."

* * * *

The second signifigant event that happened on December 14, 1981 occurred when Petitioner was allowed to have a GSA car after he informed his supervisors Hayden and Little that his own car had been stolen the night before in down-

town Philadelphia. After Petitioner returned to the office from the GSA motor pool, at about 4:30 p.m., first-level supervisor Frank Hayden requested the return of Petitioner's out-of-office ("field") assignment, which consisted of the files of four companies to be visited for the BLS's Employment Cost Index (ECI).

The next morning, on December 15th, Hayden informed Petitioner that he was going to have to return the GSA car because he no longer had a "field" assignment to justify use of the car. Throughout the morning of December 15th, Petitioner, with the concurrence of Hayden, unsuccessfully attempted to contact his union president in order to determine his rights to the car, because Petitioner felt that Hayden was acting arbitrarily in taking away his field assignment and then reversing authorization for the car, which he had been allowed to draw the previous day.

At approximately 1:00 p.m. on December 15th, Petitioner was preparing to leave the office for a 2:30 p.m. doctor's appointment when Hayden

appeared and ordered him to return the GSA car to the motor pool. Petitioner informed Hayden that he couldn't return the car because he was on Sick Leave for four (4) hours that afternoon and would have his physician certify his Application for Leave form (SF-71). Hayden said nothing further and did not state disapproval of Petitioner's sick leave status. Petitioner went to the doctor's appointment and returned the duly-certified Sick Leave form to Hayden the following morning. (A 57A).

* * * *

Although Hayden had (temporarily) removed Petitioner's field assignment, the BLS had not taken away another duty which required out-of-office transportation: Petitioner was the manager of the annual BLS Christmas Party scheduled for Friday, December 18, 1981. That evening, in pursuance of those duties, Petitioner drove the GSA car to his home in North Jersey[1] to pick up musical equipment that was

[1] Petitioner's official residence with the BLS in Millburn, New Jersey, approximately 190 miles round-trip from Philadelphia.

required for Friday's office party. The next morning, Petitioner specifically asked Irwin Feigenbaum to authorize continued use of the car as it was needed for the chores connected with the party. Feigenbaum declined and Petitioner turned over the car keys. Petitioner had driven a total of 237 miles. The Christmas Party was held on December 18th and the GSA car "incident" appeared to rapidly fade. Immediately after New Year's, Petitioner was even given back part of same E. C. I. assignment and told that he could then have a GSA car, if he wanted one.

On January 6, 1982 Petitioner invoked arbitration of the Coleman grievance against Irwin Feigenbaum, the NCFLL not having timely taken the matter to arbitration before the National Conciliation and Mediation Service.

Two weeks later, on January 21, 1982, Petitioner received a letter from his second-level supervisor, Paul A. Little, informing him that he was being placed on AWOL status for 1 hour on December 14, 1981 (representing the time for

Petitioner's trip to the motor pool)[2] and for 4 hours on December 15, 1981 when Petitioner took Sick Leave for the doctor's appointment.

Petitioner, whose removal was made effective March 5, 1982, never got the chance to prosecute the arbitration against Proposing Official Feigenbaum.

* * * *

Throughout the GSA car incident, and in the ensuing weeks, a central role was played by Petitioner's second-level supervisor, Paul A. Little, who made the critical management decisions that created the administrative predicate for the removal proposal issued by Feigenbaum on January 28, 1982. Little's handwritten notes (A 27-28A and Appendix E, infra, pp. 62-63a) not only evidence his total knowledge and involvement in the GSA car events but also these notes were used by Feigenbaum in support of his Notice of Proposed Removal. Further, Little personally approved Petitioner's Time and

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[2] This charge was reversed in Petitioner's favor in the MSPB's Initial Decision.

Attendance Record for the pay period ending December 26, 1981 and, in particular, Petitioner's use of 4 hours Sick Leave on the critical afternoon of December 15, 1981, when Petitioner is alleged to have "disobeyed" an order to return the GSA car to the motor pool. (A 54A and App. F, infra, p. 64a).

Paul A. Little is the management official who, on January 21, 1982, reversed himself and revoked his approval of the 4 hours Sick Leave for December 15, 1981, reclassified Petitioner as AWOL for 1 hour on December 14th and for 4 hours on December 15th and he also amended Petitioner's Time and Attendance Record to reflect the AWOL entries. (A 56A and App. G, infra, p. 65a). These decisions Little communicated to Petitioner in a letter dated January 21, 1982. (A 56A and App. H, infra, p. 66a).

Paul A. Little was listed on Petitioner's original list of witnesses to be called from the Agency. (A 3A). However, 11 days before the MSPB hearing was to begin on June 21, 1982,

Petitioner's attorney discovered that this critical witness was suddenly going on vacation in Latin America, leaving on June 20th and returning on July 5, 1982. The Government's attorney, undismayed, "indicated that [Petitioner] would be able to take his testimony by way of deposition at some later date..." (A 97A). Petitioner then filed a motion to secure an adjournment of the hearing until July 15, 1982 and argued the absolute necessity for Paul Little's appearance at the hearing. (A 94A, 97A, 123-125A). This motion was denied. (A 121-122A).

At the conclusion of the MSPB hearing on June 25, 1982, Petitioner and his attorney again reargued the need for securing testimony from Paul Little. (T 405-410). However, the Presiding Official decided that there was no "need for [Little] as a witness at all..." (T 410, l. 10) to which ruling Petitioner twice objected. (T 410, ll. 12-13 and 411, ll. 1-3). The Presiding Official then closed the record, except for the submission of briefs in lieu of closing arguments.

(T 413, 11. 10-12).

* * * * *

The decision to remove Petitioner was also based on two prior suspensions Petitioner received in 1980 (3 days) and 1981 (3 weeks), both of which actions were also proposed by Irwin Feigenbaum. The Agency's Decision Letter of February 19, 1980 (3 day suspension) stated that Petitioner's sole appellate remedy was for the "NCFLL [to] invoke arbitration regarding the disciplinary action" (A 13A) while its April 6, 1981 Decision Letter (15 day suspension) defined Petitioner's sole appellate remedy accordingly: "You may appeal this decision to the Merit System Protection Board (MSPB) anytime after the period beginning, etc." (A 18A).

In each instance, Petitioner's union elected to pursue a contractual remedy, under Article 13, Sec. 3(B) NCFLL Contract,[3] that BLS management

[3] Art. 13, Sec. 3(B) states: "If the final written decision * * * involves a suspension for 30 calendar days or less, the matter may be appealed directly to arbitration, in accordance with Article 16..."(Emphasis added).

refused to recognize: filing a grievance for the 3-day suspension and invoking arbitration for the 3-week suspension. Thus, the merits of these two suspensions were never reviewed by any higher authority.

In a pre-hearing motion (A 94A), Petitioner moved for the filing of a legal memorandum on the issue of the " 'grievability/arbitrability' of the 1980 and 1981 suspensions, under the union contract, as amended by the Civil Service Reform Act of 1978..." (A 118A, ¶6). That motion was denied by the Presiding Official on June 16, 1982 on the grounds that: " 'grievability/arbitrability' is an issue which may be considered at the hearing and does not, in and of itself, require submission of pre-hearing briefs." (A 122A).

However, in spite of voluminous testimony and evidence introduced by both sides on this issue during the hearing, the Presiding Official refused to decide this important legal issue: "[s]etting aside appellant's argument that I interpret the contract..." (A 144A, ¶7), deciding instead that

the Agency had met the criteria for using past discipline in consideration of the current penalty established in Bolling v. Department of the Air Force, MSPB Order N° NY07528090034 (December 28, 1981), i.e., that "the employee was given an opportunity to dispute the action by having it reviewed, on the merits, by an authority different from the one that took the action." (App. A, infra, p. 29a, 54a). (Emphasis added).

Petitioner's arguments that under Article 13, Sec. 3(B) of the NCFLL contract, 5 U.S.C. §7121(e)(1) and FPM Chapter 752, Subch. 3-3k(2), he could lawfully "grieve" the 3-day suspension and "arbitrate" the 15-day suspension have been totally ignored by the Merit Systems Protection Board and the Court of Appeals for the Federal Circuit.

*

REASONS FOR GRANTING THE WRIT

1. Rule 17.1(c) of the Rules of the Supreme Court state that review on a writ of certiorari will be granted only when there are "special and important reasons therefor," such as when a federal court of appeals has "decided a federal question in a way in conflict with applicable decisions of this Court." Petitioner avers that his dismissal is void, in accordance with the Supreme Court's decisions in the cases of Vitarelli v. Seaton, 359 U.S. 535 (1959), Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) and Greene v. McElroy, 360 U.S. 474 (1959), because he was denied the right to take evidence from Witness Paul A. Little during the MSPB discharge hearing conducted in this matter.

The Federal Administrative Procedure Act, 5 U.S.C. §556(d), provides that "[a] party is entitled to present his case or defense by

oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." The First Circuit, in interpreting §556(d), has held that: "[a] party to an administrative adjudicatory hearing does not have an absolute right to cross-examine witnesses. The plain language of 5 U.S.C. §556(d) limits that right to instances where cross-examination is 'required for a full disclosure of the facts.' " Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, cert. denied Public Service Co. of New Hampshire v. Seacoast Anti-Pollution League, 439 U.S. 824, appeal after remand 597 F.2d 306 (1st Cir. 1978).

On this issue the Ninth Circuit has ruled that elemental "fairness may dictate cross-examination on crucial issues, even though a strict reading of the APA does not." Bunker Hill Co. v. Environmental Protection Agency, 572 F.2d

1286, 1305 (1977). In Doe v. United States Civil Service Commission, 483 F. Supp. 539 (1980), the Southern District of New York found that: "the right to confront and cross-examine witnesses applied to administrative proceedings where an interest protected by the Due Process Clause is at stake. Morrisey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)..." The District Court further ruled that the Civil Service Commission had to "allow Doe to confront and question [anonymous] sources in an administrative hearing * * * If the agency views these reports as sufficiently credible to be incorporated into an official government file, then the source's credibility is a critical issue on which Doe must have the opportunity to be heard." Id., at 580. (Emphasis added).

The landmark case on the issue of whether an administrative discharge hearing is vitiated by an improper denial of the right of

cross-examination was decided by the Supreme Court in Vitarelli v. Seaton, 359 U.S. 535 (1959). The petitioner in Vitarelli, a "security risk" case, was denied the right to confront and cross-examine a non-confidential informant who had provided material information against petitioner that had been taken into consideration by the hearing board. This denial of petitioner's procedural right of cross-examination caused the Supreme Court to find Vitarelli's dismissal to be "illegal and of no effect." Id., at 545. Accord: Greene v. McElroy, 360 U.S. 474, 496, 497 (1959); Willner v. Committee on Character and Fitness, 373 U.S. 96, 103, 104, 105 (1963).

In the subsequent case of Williams v. Zuckert, 371 U.S. 531 (1963), the Supreme Court declined to follow the principles enunciated in Vitarelli, but only because:

> [N]either petitioner nor his counsel made any request, prior to the hearing * * * for [the witnesses'] appearance

> for cross-examination. The request for production of the witnesses, made only at the hearing by petitioner's counsel, was neither timely nor in conformity with the applicable regulations * * *

Id., at 532.

In Mathews v. Eldridge, 424 U.S. 319, 334 (1976), the Supreme Court held that Due Process only "calls for such procedural protections as the particular situation demands." Id., at 334. The "process that is due" depends on three factors:

> first, the private interest affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value of additional procedures; and third, the government's interest, including the function involved and the fiscal and administrative burden that the additional procedures would entail.

Id., at 335.

In accordance with these criteria, Petitioner's initial burden of establishing a "private interest affected by the official action" is met by the fact of his 17-year length-of-

service with the Bureau of Labor Statistics. This interest qualifies as both a property and a liberty interest. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). With respect to the second factor, the "risk" of erroneous deprivation of Petitioner's interests is very high due to the fact that he was denied the opportunity to question an important witness whose actions created the basis for Petitioner's removal, which evidence would have been directly relevant to Petitioner's defense of "arbitrariness," in violation of 5 U.S.C. §7703(c)(1). The third Mathews criteria is met because there would have been absolutely no burden on the MSPB in keeping the record open for Paul Little's testimony on his return from Latin America on July 5, 1982. In Central Freight Lines, Inc. v. U.S., 669 F.2d 1063 (1982), full cross-examination of 1,600 witnesses - in addition to 127 already examined - was deemed to constitute a "burden" to the government. In the within matter, we are talking about only one witness, not 1,600 or even 127.

A case decided in the Court of Claims that is virtually on point is Hanifan v. United States, 354 F.2d 358 (1965). In Hanifan, the plaintiff had been removed from his position as a special agent with the I.R.S. and, on several occasions, had requested that the Service produce two witnesses: the District Director who had signed the notice of proposed removal and plaintiff's immediate supervisor. The I.R.S. first took the position that it wouldn't produce either witness who subsequently submitted rebuttal statements to the Civil Service Commission in affidavit form. Subsequently, plaintiff's attorney made a second but unsuccessful attempt to secure their presence. The Commission issued its opinion removing plaintiff, relying on the witnesses' affidavits. In granting summary judgment for the plaintiff, the Court of Claims ruled that:

> The heart of plaintiff's case is his position that Mr. Mullen and Mr. O'Hara, who were his principal adversaries, were motivated by political prejudice; in other words, that they were out to 'get' him. One of the best ways in which plaintiff could prove his thesis would be to cross-examine

> them. It is implicit, moreover both in Zuckert and Begendorf, supra, that if under the cited regulations of the Commission, a plaintiff is improperly denied the opportunity for cross-examination of witnesses, such denial is a denial of a procedural right which is fatal to the proceeding. The rule has been firmly established in pay cases 'that unlawful administrative action depriving a claimant of a procedural right voids the action and leaves the plaintiff entitled to his money otherwise due, until (at the least) proper procedural steps are completed.'

Id., at 363-364. (Emphasis added).

Under 5 C.F.R. §1201.33, the requirement is stated that "[e]very Federal agency shall make its employees available to furnish sworn statements, or to appear as witnesses at the hearing when requested by the presiding official." The May 13, 1982 Notice of Hearing in this matter stated:

> The agency is responsible for arranging the attendance of parties and witnesses who are currently federal employees. The agency must notify the presiding official of the unavailability of any federal witness(es) and show good and sufficient cause for such unavailability.

(Emphasis added).

That Paul Little was an essential, and not a peripheral witness, for Petitioner's case derived from his role in critical management decisions that were made following Petitioner's alleged misuse of the GSA car, which incident supposedly forms the basis for Petitioner's removal.

As Petitioner's second-level supervisor, reporting directly to Associate Regional Commissioner Irwin Feigenbaum, who proposed Petitioner's removal on January 28, 1982, Little's handwritten notes for December 14-15, 1981 evidence his knowledge and involvement in these events. These notes were used in support of the Notice of Proposed Removal (A 27-28a and App. E, infra, p. 62-63a).

These notes also demonstrate Little's knowledge of the facts and circumstances of the GSA car matter at the time when he approved the 4 hours Sick Leave on Petitioner's official Time and Attendance Record for the pay period ending December 26, 1981. (App. F, infra, p. 64a).

Paul Little is also the management official who later amended that record, reclassifying Petitioner as AWOL for 1 hour on December 14, 1981 and for 4 hours on December 15, 1981. Little also was the official who notified Petitioner of the leave reclassification in his letter of January 21, 1982. (App. G and H, infra, pp. 65-66a).

Little's actions thus not only served to create the necessary predicate for issuance of the removal proposal on January 28, 1982 but it also constituted a violation of FPM 630-29, which prohibits such reclassifications in the circumstances herein. In fact, without the critical 4 hours AWOL entry on December 15, 1981, Petitioner could never be accused of disobeying the order to return the GSA car at 1:15 p.m. that day - because Petitioner was legitimately on approved Sick Leave at that time under the original entry.

Had Paul Little been called to testify in

Petitioner's discharge hearing, there was obviously a great deal that he - and only he - could have testified to: Why did he approve Petitioner's original Sick Leave entry when he possessed full knowledge of all the facts and circumstances surrounding the GSA car incident? Did Irwin Feigenbaum order him to throw Petitioner into AWOL status because Petitioner had invoked arbitration in the Coleman grievance on January 6, 1982? Was Petitioner being punished for bringing the "fraud" issue to the attention of then-Secretary of Labor Donovan? Was Petitioner being removed to get him out of the way so that he could not continue to prosecute the arbitration against Feigenbaum? In other words, was Paul Little acting "politically" as well as "arbitrarily," in violation of 5 U.S.C. §7703 (c)(1), when he decided to reclassify Petitioner as AWOL?

A vacation in Latin America (even one beginning the day before Petitioner's discharge hearing),

however well-earned, simply does not constitute "good and sufficient cause" for Little's total exclusion from the MSPB hearing. The Presiding Official, to protect Petitioner's rights, could merely have left the record open for Little's testimony, upon his return from vacation on July 5, 1982 - a mere 10 days after the record was closed and a full 11 days before briefs were due. (T 413, ll. 6-8). Were Little to testify that his "amended" AWOL entry was based on the same quantum of knowledge of the GSA car incident he possessed when he originally approved Petitioner's Sick Leave, then Petitioner would then be in a strong position to prevail on his defense of an "arbitrary agency action" in violation of 5 U.S.C. §7703(1).

However, the Presiding Official denied Petitioner's motion to adjourn the hearing to July 15, 1982 (A 121-122A) and refused to allow the record to remain open for Little's testimony. (T 410, ll. 10, 12-13; 411, ll. 1-3).

Consequently, the MSPB's Presiding Official's refusal to allow Petitioner to confront and cross-examine Paul A. Little at some point during his discharge hearing substantially prejudiced and violated Petitioner's Due Process rights under the Fifth Amendment as well as 5 U.S.C. §556(d), and the Supreme Court's decision in the case of Vitarelli v. Seaton, supra. It also rendered Petitioner's discharge hearing "unfair" and "partial" in violation of 5 C.F.R. §1201.111 (b)(1).

a. In all administrative and judicial proceedings to date, Petitioner has argued that Paul Little's act in recording 4 hours of approved Sick Leave on December 15, 1981 "reflect[ed] approval of the absence" and that the entry could only then be lawfully amended if one of the denominated exceptions were proven, i.e., that "the employee submitted fraudulent documentation or misrepresented either the time or the reason for the absence." FPM Letter 630-29.

FPM 630-29 very carefully articulates Agency policy with respect to the procedures, and consequences, of recording approved leave on a Time and Attendance record:

> 3. Recording Leave. Irrespective of the type of written request or application for leave which is required, the recording of an absence in an approved category on an official time or attendance record upon which salary payments are made reflects approval of the absence. When leave has been requested, approved and used by an employee, retroactive substitution of one category of leave for another category may be made only under conditions of law or regulation which permit a change in statutory rights, e.g., an employee on approved annual leave becomes ill and upon return to duty requests substitution of sick leave for the annual leave (38 Comp. Gen. 354 and 5 CFR 630.405). An exception to this rule is the situation where it is subsequently established that the employee submitted fraudulent documentation or misrepresented either the time taken or the reason for the absence. (Emphasis added)

The Initial Decision (App. A, infra, p. 35a) dismisses Petitioner's reading of FPM 630-29 as a "personal and narrow interpretation" and concludes that "[o]ne of the conditions precedent which must be met if appellant's argument is to prevail is contained in the second

sentence of the cited paragraph which begins, 'when leave has been requested, approved and used...' All the evidence and testimony of record shows that with respect to the sustained charge of AWOL for four hours on December 15, 1981, appellant never requested and never had approved the sick leave he alleges he used."

The Presiding Official thereby totally ignored the fact of Petitioner's Application for Leave (SF-71), which form was certified by his own physician and turned over to BLS management on December 16, 1981. Also ignored was the last sentence of FPM Letter 630-29 which reads:

> If an employee is absent without leave having been approved, it is appropriate that the time be recorded as absent without leave (AWOL) and later changed to an approved leave category only when the approving authority determines that extenuating circumstances were such that the absence is improperly charged as AWOL.

Thus, BLS management was not without a

remedy if it deemed Petitioner's absence to be an AWOL situation: it only had to record the time as AWOL on Petitioner's Time and Attendance Record for that pay period. However, this was not done. Instead, a decision was made by Paul Little to record the time in an "approved" category (Sick Leave) and Petitioner was paid his salary for same.

Courts have consistently held that "[w]here language selected by drafters of a regulation is clear and unequivocal, courts are bound to give effect to the plain meaning of the chosen words, and no duty of interpretation arises." KCMS, Inc. v. F. C. C., 600 F.2d 546 (C.A. 5, 1979). Furthermore, "[i]n interpreting regulations, the plain meaning of the words used must be considered." Usery v. Kennecott Copper Corp., 577 F.2d 1113 (C.A. 10, 1977).

The Court of Appeals for the District of Columbia has specifically held that:

> Where words of administrative agency regulations in question do not require any special competence for their interpretation, the court

> may well be equally or better qualified to interpret them than is the agency, at least where the agency's interpretation is offered in the wake of litigation which turns on those very regulations.

National Ass'n. of Greeting Card Publishers v. U.S. Postal Service, 569 F.2d 570, 186 U.S. App. D. C. 331, vacated U.S. Postal Service v. Associated Third Class Mail Users, 98 S. Ct. 253, 434 U.S. 884, 54 L.Ed.2d 169, on remand 662 F.2d 767, 213 U.S. App. D.C. 252 (C.A.D.C., 1976).

Consequently, the Agency's tortured interpretation of FPM Letter 630-29 sorely bruises the language of the regulation because it conflicts with the "plain meaning of the chosen words." KCMS, Inc., supra. Wherefore, Petitioner's removal has been "obtained without procedures required by * * * regulation having been followed" and is, therefore, void. 5 U.S.C. §7703(c)(2).

2. 5 C.F.R. §1201.111(b)(1) provides that: "[e]ach initial decision shall contain: (1) Findings of fact and conclusions, as well as the reasons or bases therefor, upon all the material issues of fact and law presented in the record." In the case herein, the record shows that the Presiding Official declined to decide a material question of law, the outcome of which, if decided in Petitioner's favor, could have drastically reduced the removal penalty imposed on Petitioner. Power v. United States, 531 F.2d 505 (Ct. Cl., 1976), Boyce v. United States, 543 F.2d 1290 (Ct. Cl., 1976). That question was:

> Whether Petitioner had a right under the NCFLL contract to grieve the 1980 (3-day) suspension and to arbitrate the 1981 (3-week) suspension, which were used in determining the current removal penalty?

The Presiding Official absolutely refused to decide this issue, albeit much testimony and numerous exhibits were introduced into the

record on this point. The Presiding Official simply bypassed the issue entirely ("[s]etting aside appellant's argument that I interpret the bargaining unit agreement...," App. A, infra, p. 31a) and found proper the Agency's use of the two prior, unreviewed suspensions on the basis of the test enunciated in Bolling v. Department of the Air Force, MSPB Order N° NY07528090034 (December 28, 1981), particularly its requirement that "the employee was given an opportunity to dispute the action by having it reviewed, on the merits, by an authority different from the one that took the action." (App. A, infra, p. 54a).

Aside from the fact that Bolling is a non-union situation, the Presiding Official has ignored 5 U.S.C. §7121(e)(1), which gives any union-covered federal employee the right to pursue either the negotiated grievance procedure or the MSPB appellate procedures, "but not both." Additionally, FPM Chapter 752,

Subch. 3-3k(2) restates §7121(e)(1) while adding the requirement that: "[i]f the employee has both appeal and negotiated grievance rights, the agency must inform him of both." (Emphasis added).

The Agency's Decision Letters, however, did not inform Petitioner of his right to either grieve the 3-day suspension or to invoke arbitration of the 3-week suspension, giving Petitioner the information that the first suspension could only be appealed by arbitration invoked by the NCFLL (A 13A) and the second suspension by a direct appeal to the MSPB. (A 18A).

As heretofore argued by Petitioner, the Agency has no lawful authority to preempt Petitioner's choice of remedy, either statutory or administrative, where the entitlement, or "discretion," to elect between the two procedures, resides exclusively in the union-covered employee. 5 U.S.C. §7121(e)(1); FPM Chapter 752, Subch. 3-3k(2).

It is axiomatic in administrative law that an agency is bound by its own regulations and that while an agency can amend or repeal its regulations, it is not free to ignore or violate them while they remain in effect. U. S. Lines, Inc. v. Federal Maritime Commission, 584 F.2d 519 (C.A.D.C., 1978). Gardner v. F. C. C., 530 F.2d 1086 (C.A.D.C., 1976). Failure by an agency to follow its regulations "tends to cause unjust discrimination and deny adequate notice contrary to fundamental concepts of fair play and due process." International House v. N.L.R.B., 676 F.2d 906 (C.A. 2, 1982). And "[w]here the rights of individuals are affected" a federal agency "is bound to follow its regulations." Sheehan v. Army and Air Force Exchange Service, 619 F.2d 1132, certiorari granted 454 U.S. 813, reversed 456 U.S. 728, on remand 686 F.2d 262 (C.A. Tex., 1980).

Wherefore, the failure of the Presiding Official to decide the "grievability/arbitrability"

issue, with respect to Petitioner's two prior suspensions, violated Petitioner's Due Process rights in a twofold manner: first, it bypassed the issue of the adequacy and validity of the notices contained in the Agency's two Decision Letters; and, secondly, it violated 5 C.F.R. §1201.111(b)(1), which requires a decision to be made on all material issues of law presented in the record. This omission is one that can only be cured on remand.

*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

John R. Connor, Pro se

5 July, 1985

APPENDIX "A"

(Filed: August 4, 1982)

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
PHILADELPHIA REGIONAL OFFICE

JOHN R. CONNOR

V.

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF LABOR STATISTICS

Initial Decision Number: PH07528210388
Date: August 4, 1982

INTRODUCTION

This is an appeal from a removal action. John R. Connor, the appellant, filed an appeal on March 22, 1982, from an action by the United States Department of Labor, Bureau of Statistics (BLS), Philadelphia, PA, removing him from his position as a Labor Economist, GS-11. The removal action was effective March 5, 1982, and was based on sustained charges of failing to follow supervisory instructions, misuse of government property, and AWOL. The charges arose out of appellant's alleged use of a government vehicle for personal use, over a 3 day period,

December 14, 15, 16, 1981, in direct defiance of his supervisor's orders. At appellant's request a hearing was held on June 21 and 25, 1982.

JURISDICTION

Under 5 U.S.C. Section 7701(a), an employee may appeal to the Merit Systems Protection Board from any action which is made appealable to the Board under any law, rule, or regulation. Applicable law provides that an employee in the competitive service who is not serving a probationary period may appeal an action removing him from the Federal service. 5 U.S.C. Sections 7511(a) (1) (A), 7512(1) and 7513(d).

The record shows that the appellant was an employee in the competitive service, that he was not serving in a probationary period, and that he was removed from his position with the BLS, Philadelphia, PA. Accordingly, I find that this appeal is acceptable for adjudication.

ANALYSIS AND FINDINGS

This agency action was taken in accordance with the provisions of 5 U.S.C. Section 7512 and Part 752, Subpart C. of the Office of Personnel Management regulations, 5 C.F.R. Section 752.310. The agency therefore, must comply with the burden of proof established by 5 U.S.C. Section 7701(c)(1)(B). In order for the Board to sustain removal of the appellant, the agency must first prove by a preponderance of the evidence that the appellant did commit the offenses charged in the January 28, 1982, letter of proposed adverse action. Assuming that the agency meets that burden, it must then establish by a preponderance of the evidence that the action taken will promote the efficiency of the service. 5 U.S.C. Section 7513(a). In that context, a preponderance of the evidence means "that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to

be true than not true." 5 C.F.R. Section 1201.56 (c)(2).

In its letter of proposed removal the agency listed the reasons and specifications, later sustained in the February 26, 1982, letter of decision, as follows:

> Reason I: You have failed to follow or disregarded supervisory instructions.
>
> Specification 1: On Monday, December 14, 1981, at approximately 2:00 p.m., you were given an office assignment and you were specifically advised that it did not require the use of a GSA vehicle. Although you had already arranged for a GSA car, your superior Frank Hayden, advised you that a car would not be necessary, since your Employment Cost Index (ECI) field assignment which would have necessitated use of a GSA car had been reassigned to another field representative, Lawrence Hess. At approximately 3:45 p.m., Frank Hayden learned from

Charles Parys, a BLS field representative that you had left the office to pick up a GSA vehicle. At approximately 4:15 p.m., you returned from the GSA Motor Pool with a GSA vehicle, tag number 09176. Frank Hayden again informed you that, since you had no field assignment, a GSA car was not necessary. You, therefore, disregarded your supervisor's instructions by obtaining a GSA vehicle.

Specification 2: On Tuesday, December 15, 1981 at approximately 8:25 a.m., Frank Hayden ordered you to return the GSA vehicle, tag number 09176. You told him that you would not return the car to the motor pool. Your refusal to comply with this instruction and return the GSA car, tag number 09176, constituted a disregard of and failure to follow supervisory instructions.

Specification 3: On Tuesday, December 15, 1981 you went to Lawrence Hess' work station and removed the ECI assignment,

previously reassigned from you to Hess. You disregarded Frank Hayden's instructions when he ordered you to leave Lawrence Hess's work alone and you took this work to your own work station against the specific instructions of your supervisor. Subsequently, Mr. Hayden told you to return the work which you had taken from Lawrence Hess' desk and you refused to comply. This action constitutes disregard of supervisory instructions.

Specification 4: On Tuesday, December 15, 1981, at approximately 9:30 a.m., Frank Hayden asked you if you had returned the GSA car, tag number 09176. You informed Mr. Hayden that you would not discuss it with him until you had a union representative present. At approximately 1:15 p.m., Frank Hayden directed you to return the GSA car to the motor pool. You told him you were not going to do so, because you had a doctor's appointment. Frank Hayden

repeated his directive to return the car, but you failed to follow his instructions by refusing to return the GSA car, tag number 09176, to the motor pool.

Reason II: You have misused Government property:

Specification 1: On Monday, December 14, 1981, you obtained a GSA vehicle, tag number 09176, from the GSA motor pool, although you had no field assignments. GSA Form 312, reflected an odometer reading on the vehicle of 9296 miles at the time you received the vehicle from the motor pool. When I received the keys to the vehicle from you on December 16, 1981, a check of the odometer indicated a reading of 9532 miles. Thus, you drove the vehicle a total of 236 miles, although you had no official business which would require you to drive that distance. You, therefore, misused the Government vehicle.

Reason III: You were absent from duty without authorization or approved leave.

Specification 1: On Monday, December 14, 1981 at approximately 3:45 p.m., your supervisor, Frank Hayden, was told by Charles Parys, a fellow employee, that you had left the office to pick up a GSA vehicle from the motor pool. You had been previously advised by your supervisor that, since you had no field assignments, a GSA vehicle was not needed to perform your assigned duties. Your assignment required you to be in the office for regularly scheduled hours 8:15 a.m. - 4:45 p.m. You did not request approval to be away from the workplace, nor was such approval given by any management official. You had no authority to leave the workplace for the purpose of obtaining a GSA vehicle. Accordingly, your unwarranted absence from the workplace was not approved and you were absent without leave

(AWOL) a total of one hour.

Specification 2: On Tuesday, December 15, 1981, approximately 1:15 p.m., you advised your supervisor that you had a doctor's appointment. You said you would have the doctor provide him with a note. However, you left the office before he had approved your sick leave and after he had directed you to return the GSA vehicle, tag number 09176. It is the practice of BLS in this Region to require employees to notify their supervisors prior to the approval of any sick leave request. Accordingly, your absence from the workplace was not approved and you were absent without leave (AWOL) a total of four hours.

In support of the charge in Reason I, Specification 1, and Reason III, Specification 1, Frank J. Hayden, Chief of the BLS's Philadelphia Data Center, and appellant's immediate supervisor testified to the facts and circumstances

of December 14, 15, and 16, 1981. By way of background, Hayden testified that appellant performed field representative duties which required he visit and/or telephonically contact companies in order to collect wage information. Typical of his work as a senior person in the division was appellant's assignment to complete Employee Cost Indexes (ECI's) so that wage and benefit increases could be memorialized. Generally field representatives make their own schedules, including appointments and visits, and are not monitored closely by the supervisors.

On Monday, December 14, 1981, Hayden was informed by his supervisor, Paul Little, that appellant's car had been stolen over the weekend and that if it was at all possible, appellant was to be given telephone assignments. This suggestion was offered simply because appellant didn't have a car and was not done to harass him. Since it is common to rearrange assignments, and certainly within Hayden's authority as a supervisor to change assignments, Hayden took appellant's

personal visit assignments (4 ECI's), assigned them to Larry Hess, and reassigned appellant work which he could complete at his desk. These duty changes occurred at about 2:00 p.m. when Hayden saw appellant for the first time that day. At about that same time appellant and Hayden discussed the car theft and agreed that appellant's time loss that morning would be recorded as emergency annual leave. It seems that upon discovery of his loss, appellant was upset and failed to show for work or otherwise contact the office prior to 10:15 a.m. in order to explain his predicament. In any event, appellant asked for and was given approved leave for his absence.

Appellant informed Hayden that he had asked Valerie Quinn to see about arranging for him to get a government automobile. Hayden testified "I told him I didn't think it was necessary." Hayden averred that he he lived near appellant and offered to make himself available to help run any holiday errands appellant might need to complete.

At about 3:45 p.m. that afternoon Hayden returned to appellant's work area and observed that he was not at his desk. Inquiry revealed appellant had left the office a short time earlier on his way to the motor pool to pick up a car. Hayden was upset, since, after telling appellant he did not think a car was necessary, he, Hayden thought the matter was ended. When appellant returned to the office at about 4:30 p.m., Hayden again told him that the car was not necessary. Appellant responded that he was sure Hayden could get him a field assignment. Hayden said he couldn't, and there was no justification for appellant to have a car. Appellant gave no official reason to have the car and said nothing about his need for the auto to complete arrangements for the Christmas party. Hayden averred that he did not give any instructions to appellant but gave him his opinion that the car was not necessary. (Emphasis added.)

Irwin L. Fiegenbaum, Assistant Regional Commissioner, for the BLS testified that he is

appellant's third level supervisor and as such was aware of circumstances as existing on December 14, 1981. When Paul Little informed him that appellant had lost his car, he also advised that field assignments were taken away from appellant and replaced with telephone work not requiring the use of a car. Fiegenbaum later learned that appellant had requested that a secretary arrange for his use of a government auto. Since he did not concur, Fiegenbaum told Little that appellant did not need a car and shouldn't be getting one. At this point, Fiegenbaum testified that he was not sure if appellant was aware that he was not allowed to have a car and gave instructions to make sure the car was returned.

Specification 1 of Reason I and Specification 1 of Reason III cannot be sustained on the evidence offered by the agency. No evidence was offered to show that any instructions were given to appellant that he was not to obtain a GSA car. Hayden testified he merely gave appellant

his opinion that a car was not necessary, specifically stating that he gave no instructions. Additionally, Fiegebaum was not sure appellant was aware that agency management decided that he was not allowed to have a car. Even though appellant's visit assignments had been taken from him there was no specific showing that appellant was instructed that he was not to have a car. Hayden made no effort to contact the motor pool to cancel the request when he learned appellant had left to pick up the car, and when appellant returned at 4:30 p.m. he wasn't ordered or instructed to return the car or hand over the keys, he was again merely advised by his superior that the car was not necessary. Furthermore, with respect to the charge in Reason III, Specification 1 of one hour AWOL the agency offered no evidence to prove the charge by preponderant evidence. Absent proof that appellant was instructed by Hayden or any other agency official that he was not authorized to check out a GSA vehicle,

appellant cannot be charged one hour AWOL for leaving his office to pick up the auto. Obtaining a GSA car on occasion was apparently a routine administrative evolution completed from time to time in the normal course of duty. The agency has not shown that appellant was not, on this occasion, simply completing a chore normally expected of him in his day to day activities. Appellant had not been instructed that he was to stay in the office and not go to the motor pool, and absent proof to the contrary, I must find that he was in a duty and pay status for the one hour charged in this specification.

The remaining reasons and specifications are consolidated for analysis. On the evening of December 14, 1981, and during the succeeding two days appellant admittedly used the government car to commute to work, go to dinner and pick up party items from his North Jersey home, all the while engaging, in my opinion, in a test of wills with agency officials.

Hayden testified that at about 8:25 a.m. on December 15, 1981, he was told by Little that appellant was seen arriving at work in the GSA car. Little told Hayden to tell appellant to return the car. Hayden approached appellant and told him that he had to return the car. Appellant replied, No, that he was not going to do it. Hayden did not argue with him but returned to his office to report back to Little. While he was on the phone, appellant went to Larry Hess' work area and picked up and removed the ECI assignments that had been taken away from him the previous day. Hayden told appellant to leave Hess' work area but his order was ignored. Later, at about 9:30 a.m., Hayden again approached appellant and told him to return the car and ECI assignments. Appellant's response was No, and further, that he would not discuss anything pertaining to the car or the assignments unless a union representative was present. Hayden testified that he told appellant that he did not consider the ECI assignments

to be a union matter and that he wanted the work returned. Appellant responded that he considered the work to be his assignments and they had been taked from him arbitrarily. Angry words were exchanged and nothing more was done until after lunch. At about 1:15 p.m., on the advice of Fiegenbaum, Hayden approached appellant and "directed" him to return the government car. Appellant said he wasn't going to do it because he was on sick leave. He had a doctor's appointment. Hayden asked when all this happened and appellant replied, "this morning". Hayden repeated his directive to return the car. Appellant left for his medical appointment and Hayden neither approved nor denied the sick leave.

Hayden further testified that early Wednesday morning, December 16, 1981, appellant went to see Fiegenbaum and later returned the car keys to Hayden. When the auto was checked Hayden found that it had been driven 236 miles. Fiegenbaum testified that on the morning of

December 15, 1981, he was told by Little that appellant still had the car. He instructed that Hayden was to direct appellant to return the car. Appellant refused to obey the direct order to return the car or the ECI assignments. With regard to the sick leave issue Fiegenbaum testified that policy is that all sick leave be requested at least three days in advance except in an emergency. Even though appellant knew the policy he did not request sick leave, he told Hayden he had a medical appointment and just left the office. No sick leave was requested and none was approved.

The next morning, December 16, 1981, he personally talked to appellant about his use of the vehicle. Appellant asked that he be permitted to retain the car for two or three weeks to "run around". Fiegenbaum refused the request and appellant brought up the subject of the Christmas party. Because appellant had managed the arrangements for the party the year before and done such a good job, Fiegenbaum had

requested some weeks earlier that appellant take charge of this year's party. Appellant agreed but requested assistance to which Fiegenbaum readily agreed. About 12 hours of administrative leave time had been approved for activities involving the party. In any event appellant said he needed the car to use in completing preparations for the party. Fiegenbaum refused to allow him to keep the car for this purpose and ordered appellant to return the car. On cross-examination, Fiegenbaum averred that there was never any confusion with respect to appellant's authority to use a GSA car, he did not have any official reason to check out or use the vehicle.

Appellant testified that his private car had been stolen on December 13, 1981, and as a result he was deprived of transportation. Upon arriving at work late in the morning of December 14, 1981, appellant explained his circumstances to Little and Hayden and told them he would be needing a GSA car not only to do his job but

to complete arrangements for the party as well. When he left to pick up the auto at 3:30 p.m. no one had told him he should not or could not have a GSA car. On his return at 4:30 p.m. Hayden took his ECI visit assignments, a not uncommon occurrence, and reassigned them to Larry Hess. Appellant admits using the car to go home that evening and later to go out to dinner.

Next morning, at about 8:30 a.m. Hayden told him he had to give up the car. Appellant felt harassed and said he would not give it up but was going to grieve the matter. Hayden took no further action. That same morning appellant admitted going to Larry Hess' desk and taking back the four ECI assignments. His action was prompted by a fit of pique and, according to appellant's testimony, was not witnessed by Hayden. At about 10:30 a.m., Hayden found out that he had taken the units and ordered appellant to return them. Appellant refused to return them or talk about it until

he obtained union representation. In any event, appellant later realized his mistake after he cooled down, and returned the ECI units 4:30 p. m. that afternoon.

With regard to the sick leave incident appellant testified that he had had an appointment with his doctor scheduled for early on the morning of December 15, 1981. Because he had no out of the office work that day appellant called the nurse before leaving home that morning and cancelled the appointment. The nurse advised him that there may be cancellations that afternoon and that appellant could call later in the day if he wanted to be seen. Appellant forgot to get back to the nurse until after lunch at which time he called and was told that the doctor had a 2:30 p. m. opening. Appellant intended to leave a note for Hayden explaining he was at the doctors and go for the appointment. At about 1:15 p.m., Hayden came to his desk and ordered him to return the car and be back in the office in 20 minutes.

Appellant replied "I can't, I'm on sick leave." Hayden asked when this happened and appellant replied just a few minutes ago. In appellant's words, Hayden was speechless, he didn't know what to say. Appellant then left to his appointment.

The next morning appellant spoke to Fiegenbaum. He told Fiegenbaum that he needed the car to handle the party assignment and felt he was to use it. Fiegenbaum told him to return the keys to Hayden and appellant complied. Appellant did not remember telling Fiegenbaum that he needed the car for two or three weeks and felt the denial of use of the car was petty harassment, very uncalled for, and totally unprofessional treatment of a senior employee. Appellant testified that he should not have been handled in such an insulting manner. On cross-examination appellant admitted that he organized the 1980 party and used his personal car for this purpose. He did not record the mileage charge or any expense claim and did not

claim reimbursement to the use of his private auto on that occassion.

Based on the totality of the evidence including appellant's admissions under oath and his February 8, 1982, written response to the proposed removal, (agency file, tab #11) I find Reason I, Specifications 2, 3 and 4; Reason II; and Reason II, Specification 2 are sustained.

In his closing brief appellant challenges the removal action arguing a number of affirmative defenses including "...violations of 5 U.S.C. Section 2302(8)(A)(9) and (11)." (sic).

In accordance with 5 U.S.C. Section 7701(c)(2), the Board may not affirm an agency decision when that decision shows harmful error 1/ in the application of the agency's procedures in arriving at a decision, when the decision is based on any prohibited personnel practice, as described in 5 U.S.C. Section 2302(b), or when the agency decision is not in accordance with the law. The above reasons for reversal of an adverse action are considered to be affirmative

defenses, and in accordance with Board regulations. 5 C.F.R. 1201.56, the burden of proof as to these defenses rests with the appellant. The burden must be carried by a preponderance of the evidence. In the Matter of Frazier, 1 MSPB 159 (1979); Parker v. Defense Logistics Agency, 1 MSPB 489 (1980).

Although appellant cites violation of three sections of the statute his basic premise as noted from his testimony and brief is that the agency retaliated against him for his activities as a union steward in advocating due process for a co-worker.

To establish a violation of Section 2302(b)(9), an appellant must demonstrate that he or she engaged in an activity protected by the section; that he or she subsequently was treated in an adverse fashion by the employer; and that the deciding official had actual or constructive knowledge that the employee was engaged in the protected activity. The appellant must also demonstrate that there was a causal

connection between the protected activity and the adverse action and that the protected activity was a significant factor in the taking of the adverse action. (Emphasis added). Gerlach v. Federal Trade Commission, MSPB Order No. DC07528010020 (December 15, 1981), citing Frazier, supra.

In support of his charge of retaliation appellant testified regarding his attempt to controvert the reassignment of Nancy Coleman. Appellant alleged fraud in the reassignment on the part of Fiegenbaum since, in his opinion, Coleman did not assume price program duties until August 17, 1981, even though her form 50 noted the effective date of the reassignment to be August 9, 1981. (Appel. Ex. #3). Appellant's August 13, 1981 request for a stay of the action addressed to Fiegenbaum was denied by him on August 14, 1981, on the basis that the action had been completed on August 9, 1981, prior to receipt of the stay request. (Appel. Ex. #1 & 2). Appellant then pressed for an

expedited grievance pertaining to the Coleman matter which was ultimately denied on December 7, 1981, by the agency. (Appel. Ex. #16). Appellant then invoked arbitration by letter dated December 31, 1981, mailed January 6, 1982. (Appel. Ex. #19). It was this union activity and his charge of possible fraud against Fiegenbaum that appellant considers to be preponderant evidence in support of his allegation of retaliation. I do not agree.

Agency documents show that Fiegenbaum first discussed his decision to reassign Coleman to the price vacancy on August 5, 1981, and on August 7, 1981, wrote her a memo with an attached SF-52 dated August 6, 1981, showing he requested the personnel department to reassign Coleman to the price branch. (Agency Ex. #8 & 9). It was the personnel officer, William F. Leetch, who signed the SF-50 dated August 12, 1981, reassigning Coleman effective August 9, 1981. (Appel. Ex. #2). Appellant offered no evidence that Fiegenbaum set the actual effective date

of the reassignment and did not pursue the retaliation when he cross-examined either Fiegenbaum, the proposing official or Margolis, the deciding official. In addition, appellant's letter invoking arbitration was not mailed until January 6, 1982, whereas, Fiegenbaum's testimony and agency exhibit #7 shows Fiegenbaum had decided to propose appellant's removal as early as December 21, 1981. Further, appellant offered no evidence to establish that the deciding official, Alvin Margolis, had actual or constructive knowledge of any protected activity. As noted above appellant did not cross-examine Margolis regarding his knowledge of the representation, nor did appellant send copies of any letters, memos or mailgrams to Margolis. (Appellant's Ex. #10-24).

Finally, appellant has not demonstrated any causal connection between the protected activity and the adverse action. Fiegenbaum testified credibly that the appellant's union activity had nothing at all to do with the proposed

removal. Appellant had been a steward for only a short time and the Coleman grievance was the first union case on which Fiegenbaum and appellant met. Fiegenbaum testified that he and appellant tried to resolve the matter but to no avail. (See Appel. Ex. #11 for appellant's notes of the meeting.) I find no evidence to support appellant's claim of retaliation for union activities, and therefore dismiss it from further consideration.

Appellant next alleges harmful error in that in determining the penalty to be imposed, the agency considered appellant's two prior disciplines.

In the letter of decision the agency cited appellant's past disciplinary record and noted it had been taken into consideration in arriving at the removal penalty. Appellant had been suspended for three days on March 17, 1980, for failure to follow leave requesting procedures and the resultant charge of AWOL, and had been suspended for fifteen days on April 20, 1981,

because of his failure to follow the instructions of his supervisor in matters relating to work rules, failure to follow leave requesting procedures and a resultant charge of AWOL. (Agency file tabs #2, 3, 4.)

In a recent decision regarding the use of past discipline in consideration of the current penalty to be imposed, the Board has held that prior disciplinary actions will receive only a limited review 2/ if the three criteria set forth at the former FPM Supp. 752-1, S4-3b(1) are met. 3/ Bolling v. Department of the Air Force, MSPB Order No. NY07528090034 (December 28, 1981); See Weiss v. United States Postal Service, MSPB Order No. BN075209064 (March 23, 1982). The Board held, further, that no new evidence or argument, other than the appellant's reasons for the challenge, will be admissable if the three criteria are met. Bolling, supra.

In addition to appellant's challenge to the past discipline in his closing brief, he challenged the agency notation of his disciplinary

record at the hearing, insisting that he be permitted to litigate the previous actions. I denied appellant's motion then and I again fine now, that there is no merit to his allegation of error in the use of the prior disciplinary record.

There was and is no dispute that the first and third criteria noted above were met. The second requirement, i.e., "the employee was given an opportunity to dispute the action..." is controverted by appellant.

In its February 15, 1980, letter of decision regarding the three day suspension, the agency advised appellant, at page three, "In accordance with Article 13, Section 3(B) of the DOL/NCFLL Agreement you may request that NCFLL invoke arbitration regarding this disciplinary action."

In its April 6, 1981, letter of decision respecting the 15 day suspension, at page 2, the agency advised appellant, "You may appeal this decision to the Merit Systems Protection Board

(MSPB) anytime during the period beginning with the day after the effective date of your suspension until not later than twenty (20) calendar days of that effective date."

Robert H. Hastings, Director of Labor Management Relations with the agency testified that the advice given in the two letters, supra, was accurate and no other offer of a meritorious review would have been appropriate.

Appellant, on the other hand, maintains that he should have been allowed to grieve both actions under the NCFLL contract. Setting aside appellant's argument that I interpret the bargaining unit agreement, two facts are immediately clear from the testimony and evidence. First, the agency met the requirement articulated in the Board's Bolling decision in that they did in fact give the appellant the opportunity to dispute the action, albeit by a method to which appellant disagrees; and second, I asked appellant directly if he took advantage of the opportunity offered by the agency

for a separate review on the merits. His answer was no, he did not seek to arbitrate the three day suspension nor did he file a petition for appeal regarding the 15 day suspension. Had the appellant sought review of the actions in accordance with the agency advice and had been refused an independent review there might be some merit to his argument. However, where appellant is advised of his appeal route and he elects to challenge the agency by ignoring their advice and proceeding independently, based on his individual interpretation of the laws, rules, regulations, and contract, he cannot succeed in alleging harmful error if the result is not to his liking. I find, therefore, that the agency met the requirements under Bolling, supra, and that the challenged prior disciplines are not "clearly erroneous". The agency consideration of appellant's prior disciplinary actions in reaching a decision regarding the penalty to be imposed for the current sustained charges

was proper under all the circumstances in this case.

Appellant alleges that there was harmful error in the application of the agency's leave procedures. Appellant has the burden of proving harmful error in the application of an agency regulation by a prepronderance of the evidence. See Parker, supra. To prevail in this allegation the appellant must set forth or identify the regulation and show how that regulation was violated. Jones v. Department of the Navy, MSPB Order No. SF07528010398 (January 15, 1982). In support of his argument appellant cites FPM Letter 630-29, dated January 28, 1982, (Agency Ex. #6, agency file tab #11), specifically page 2, which provides:

> 3. Recording Leave. Irrespective of the type of written request or application for leave which is required, the recording of an absence in an approved catefory on an official time or attendance record upon which salary

payments are made reflects approval of the absence. When leave has been requested, approved, and used by an employee, retroactive substitution of one category of leave for another category may be made only under conditions of law or regulation which permit a change in statutory rights, e.g., an employee on approved annual leave becomes ill and upon return to duty requests substitution of sick leave for the annual leave (38 Comp. Gen. 354 and 5 C.F.R. 630.405). An exception to this rule is the situation where it is subsequently established that the employee submitted fraudulent documentation or misrepresented either the time taken or the reason for the absence. If an employee is absent without leave having been approved, it is appropriate that the time be recorded as absent without leave (AWOL) and later changed to an

> approved leave category only when the approving authority determines that extenuating circumstances were such that the absence is improperly charged as AWOL.

and relies, for his argument, on his personal and narrow interpretation that if the sick leave for December 15, 1981, was entered on his time and attendance card, as it certainly was (Agency Ex. #11), then the agency violated its regulations when it changed appellant's status to AWOL. Appellant's argument is not persuasive. One of the conditions precedent which must be met if appellant's argument is to prevail is contained in the second sentence of the cited paragraph which begins, "when leave has been requested, approved, and used..." All the evidence and testimony of record shows that with respect to the sustained charge of AWOL for four hours on December 15, 1981, appellant never requested and never had approved the sick leave he alleges he used. By his own

testimony and in his written reply to the proposal to remove, appellant did not request to have his sick leave approved, he told Frank Hayden he was on sick leave and could not return the car and Hayden "... said not one more word". (Emphasis in original.) Further, testimony of agency witness showed that sick leave was normally requested at least three days in advance, if possible, and in emergency situations a prompt call to the supervisor was in order. Appellant never claimed, nor did he show that his last minute doctor's appointment, for purposes of an examination, was an emergency. In addition, the bargaining unit contract, Article 32 (Joint Ex. #1), and the agency regulation regarding use of sick leave (Agency Ex. #5) are both couched in terms of "granting" or "approving" sick leave, terms which in my opinion and from the testimony requires that an employee first request use of the leave before the agency can grant, approve, deny, or disapprove. Appellant's arrogant

presumptuous tactic telling his supervisor he could not return the GSA car because he was on sick leave was a violation of the spirit and intent, if not the letter, of the sick leave OPM authority, he cites, and I find that he has not shown by a preponderance of the evidence that the agency committed harmful error in abiding by its own regulations.

Appellant's next challenge to his removal is that it was the result of unlawful bias and prejudice on the part of the proposing official, Irwin Fiegenbaum. In support of his argument appellant cites the contents of his exhibit #25.

Appellant's exhibit #25 is a copy of two pages of a steno notebook pad offered into the record during the testimony of Charles E. Scott who appeared as appellant's witness. Scott identified eight pages of handwritten notes, two pages of which are exhibit #25, as being in his handwriting and most likely recorded sometime in 1972 when he was the Chief of Field activities. Scott testified that he made it a practice

to jot down notes to himself so that he would not forget them. The notes of interest are "Adverse Action Manual," "Get record on J. Connor LWOP," and "Notice in writing to Connor." Scott did not recall when he made the notes, had no recollection as to what they were concerned with, never received any direction from Irwin Fiegenbaum to take any adverse action against appellant, and never took any adverse action against appellant himself. Scott testified that the notes were his own personal property and that he did not give them to appellant. He had no idea how appellant obtained the originals since as far as he was concerned they were destroyed. In his own testimony appellant attempted to resolve the issue of how the pages of personal notes came into his possession by averring that sometime in 1972 he found the pages on his desk. As I did at the hearing, and now in this initial decision, I want to make it perfectly clear to appellant that his exhibit #25 has absolutely no probative

value. Appellant has not shown by a preponderance of the evidence through his exhibit, or any other testimony or evidence that the proposing official was biased or prejudiced against him.

Appellant's final defense is that he did not misuse government property and therefore the penalty was excessive. The appropriateness of the penalty will be discussed, infra.

With respect to the misuse issue, appellant argues that official use, as opposed to personal use, has been established in several leading cases. He then cites Clark v. U.S., 162 Ct. Cl. 477 (1963); Brownell v. U.S., 164 Ct. Cl. 406 (1964); and Murphy v. Kelly, 259 F. Supp. 914 (1966) in support of his claim that he did not misuse the car.

The controlling statutory language regarding misuse of government vehicles can be found at 31 U.S.C. Section 638a(c)(2) which reads in part:

> Any officer or employee of the Government who willfully uses ... any Government-owned

> passenger motor vehicle ... or of any passenger motor vehicle ... leased by the Government, for other than official purposes ... shall be suspended from duty by the head of the department concerned, without compensation, for not less than one month, and shall be suspended for a longer period or summarily removed from office if circumstances warrant.

None of the cases cited by appellant support his argument nor do they define official as opposed to non-official use of a government vehicle. In Clark, a foreign service officer assigned to and living with his family in Chile, was away on assignment to Easter Island when his wife used a government vehicle for private errands. The employee's personal auto had been damaged beyond repair and he was denied permission to import a second car. Under those extenuating circumstances, the court found that there was not enough reason to discharge the employee. In Brownell and Murphy the court sustained

discharge as penalty for personal use of a government vehicle. In Murphy, the employee chose to use the vehicle after being advised that unofficial use of the car could be cause for discipline. The employee's counsel sought to make much of the fact that the personal use was a minor one. The court found, however, that the use was purposeful and sustained the discharge.

In this case, I find that appellant's personal use of the GSA car was purposeful and not a minor one. Appellant admitted that he used the vehicle to commute to work from his residence and go to dinner after working hours. He attemps to excuse his use of the car for the 190 mile trip to his Millburn, New Jersey, permanent residence by testifying that the trip was in furtherance of his duties in managing the party and was therefore "official" agency business. I disagree. On review of the facts I am convinced that the appellant needed a car to replace his stolen vehicle and he decided he

would use a government vehicle regardless of what agency officials ordered. On Monday, December 14, 1981, when he checked the car out appellant used it for personal purposes. On Tuesday, December 15, 1981, he was ordered at least three times to return the car. He ignored the directive and left the office to visit his doctor. The evening of the 15th, after being ordered and refusing to return the car, appellant travelled to Millburn, ostensibly on "official" use. At no time up to this point, December 15, 1981, did appellant request permission to use the car for party purposes, and the fact is that on December 16, 1981, when he finally did request it for that purpose he was turned down flat. Fiegenbaum's unrebutted testimony was that he denied appellant's December 16, 1981, request to use the car for party purposes because that use, in his opinion, was not official. My finding with respect to the issue of misuse of a government vehicle as noted in Reason II, Specification 1, is that the

specification is sustained.

As noted above, appellant submits that the penalty is improper and excessive. In view of the appellant's challenge to the penalty, I must determine if the sustained charges merit imposition of the sanction of removal. In Douglas v. Veterans Administration, MSPB Order No. AT075299006 (April 10, 1981), the Board held that it has the power to mitigate an agency-imposed penalty, but that it will do so only when the agency has failed to conscientiously consider all relevant factors and strike a responsible balance within tolerable limits of reasonableness. As long as the agency acts reasonably and responsibly, it may exercise discretion and the Board will defer to its selection. This means that even in instances where the Board might not have imposed the same penalty as the agency in the first instance, it must allow the agency's penalty to stand unless it was clearly inappropriate.

To determine whether a penalty is reasonable,

the circumstances must be reviewed and balanced. "A balance must be struck between the seriousness of the offenses and certain mitigating factors." Cooper v. Department of the Treasury, MSPB Order No. PH075209068 (August 31, 1981).

The factors to be considered by the agency in selecting a penalty, and by the Board in reviewing a challenged penalty, include:

> (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
>
> (2) The employee's job level and type of employment including supervisory or fiduciary role, contacts with the public and prominence of the position;
>
> (3) The employee's past disciplinary record;

(4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

(5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties;

(6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;

(7) Consistency of the penalty with any applicable agency table of penalties;

(8) The notoriety of the offense or its impact upon the reputation of the agency;

(9) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

(10) Potential for the employee's rehabilitation;

(11) Mitigating circumstances surrounding

the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

(12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Douglas v. Veterans Administration, supra, at 32-33. These factors may be grouped into four more general categories: the nature of the offense and its effect on operations; the employee's background and potential; the agency's handling of similar cases; and mitigating circumstances peculiar to the case.

The agency views the appellant's offenses during the December 14 to 16, 1981, period to be extremely serious. Especially in light of appellant's prior disciplinary actions. The testimony of the BLS's Regional Commissioner, Alvin Margolis, was especially noteworthy.

Mr. Margolis' demeanor as a witness can best be described as one of a competent, confident, and reasonable agency head who is not given to rash or emotional reaction. In his testimony, relating his detailed analysis of his decision to remove appellant, Margolis made a number of reasonable observations. After hearing all the agency evidence including Hayden's version of events, but before making his final decision, Margolis concluded that appellant's conduct in refusing to return the car was deliberate and not spontaneous. Hayden told appellant more than once to return the car and gave him every opportunity to comply. Still appellant steadfastly refused. In Margolis' opinion, appellant's attempt to take sick leave was just a subterfuge to avoid returning the car. Appellant had the opportunity to take the vehicle back to the motor pool before his doctor's appointment but again, failed to do so. The entire chain of events, according to Margolis,

made it crystal clear that the agency's future ability to manage appellant in the employer/ employee relationship became doubtful. Appellant was willfully insubordinate, and since he had a history of similar refusal to follow supervisory instructions or agency regulations, his prognosis for rehabilitation was poor. Margolis considered a lesser penalty, i.e., a three month suspension, but under the totality of the circumstances in this case, and notwithstanding appellant's approximately 18 years of service, Margolis decided on removal. In assessing the impact appellant's pattern of insubordination had on the agency, Margolis considered that a great deal of time and effort was expended by managers trying to resolve the issues, time they should have spent on duties furthering the agency mission. In sum, appellant's AWOL, insubordination and personal use of the government vehicle were serious offenses, the penalty for which the deciding official felt compelled to assess removal.

Appellant has been employed in the federal civilian service for about 17 years. On cross-examination by appellant's counsel, Margolis testified that qualitatively appellant's performance was satisfactory, but quantitatively his performance was less than satisfactory.

An employee may be removed for refusal to comply with proper orders. Sletten v. Department of the Air Force, 2 MSPB 209 (1980). The law is clear that an agency is entitled to expect its employees to respect authority in terms of the orders of its supervisory personnel. An employee is expected to act in conformance with such accepted employment standards, Hubble v. Department of Justice, MSPB Order No. DC075209228 (June 11, 1981). Therefore, an adverse action resulting from an insubordinate act will promote the efficiency of the service. See Bishop v. McKee, 400 F.2d 87 (10th Cir. 1968); Studemeyer v. Macy, 321 F.2d 386 (D.C. Cir. 1963). In fact, insubordination itself is a cause sufficient to justify discharge,

May v. United States Civil Service Commission, F. Supp. 659, 667 (W.D. La. 1963); and continual insubordination undoubtedly justifies removal of an employee in the federal sector. See Mitchell v. United States Postal Service, MSPB Order No. AT075299003 (July 14, 1981); Jefferson v. Veterans Administration, MSPB Order No. PH075209012 (May 22, 1981).

With regard to the penalty of removal for AWOL, I find that unauthorized absence impacts on the duties of any position since the offense, by its very nature, precludes the employee from performing his duties. The Board has held that "unauthorized absence from duty is a proper ground for removal since by its very nature it disrupts the efficiency of the service." Desiderio v. Department of the Navy, 4 MSPB 171 (1980). The courts have held that Absence Without Leave (AWOL) is a proper basis to justify the removal of an individual from federal employment. Chiaverini v. United States, 157 Ct. Cl. 371 (1962) Rubin v. United States,

150 Ct. Cl. 28 (1960); Chiriaco v. United States, 235 F. Supp. 850 (N.D. Ala. 1963), aff'd 339 F.2d 588 (5yh Cir. 1964); Bond v. Vance, 327 F.2d 901 (D.C. Cir. 1964).

Regarding the penalty of removal for personal use of a government vehicle, as noted above in Brownell and Murphy, supra, removal is an appropriate penalty which promotes the efficiency of the service. See also 31 U.S.C. Section 638a (c)(2).

In conclusion, removal as a penalty for AWOL, personal use of a government vehicle, and insubordination promotes the efficiency of the service and I can find no compelling mitigating circumstances in this case. While the agency might have imposed a lesser penalty, its decision to remove appellant cannot be termed unreasonable in light of all the circumstances.

DECISION

The agency action is sustained.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on 08 SEP 1982 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to this appeal, the Director of the Office of Personnel Management, or the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth specific objections to the initial decision, supported by references to applicable laws or regulation, and with specific reference to the record. The petition for review must be filed with the Secretary to the Merit Systems Protection Board, Washington, D.C. 20419 no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition

for review when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the Presiding Official is based on an erroneous interpretation of statute or regulation.

Under 5 U.S.C. Section 7703(b)(1) the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any final decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board.

/s/ William P. Butler
William P. Butler
Presiding Official

1/ 5 C.F.R. 1201.56(c)(3) defines harmful error as:

> Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

2/ A review of the record.

3/ First, the employee was informed of the action in writing; second, the employee was given an opportunity to dispute the action by having it reviewed, on the merits, by an authority different from the one that took the action; and third, the action was made a matter of record.

APPENDIX "B"

(Filed: April 9, 1984)

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JOHN R. CONNOR	
v.	DOCKET NUMBER PH07528210388
UNITED STATES DEPARTMENT OF LABOR	

ORDER

Having fully considered the appellant's petition for review of the initial decision issued on August 4, 1982,[1] and finding that it does not meet the criteria for review set forth at 5 C.F.R. §1201.115, the Board hereby DENIES the petition.[2]

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. §1201.113(b).

The appellant is hereby notified of the

right under 5 U.S.C. §7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D. C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

APR 9 1984
(Date)

/s/ Robert E. Taylor
Robert E. Taylor,
Secretary

Washington, D. C.

1/ In the Initial Decision at 7, the presiding official referred to "Reason II, Specification 2" in finding that the charge that appellant was absent without leave (AWOL) for a total of 4 hours on December 15, 1981, was sustained by a preponderance of the evidence. Since Reason II pertains to the charge that appellant misused government property, it is clear that the correct reference is to "Reason III, Specification 2."

2/ Appellant claims that the presiding official was biased against him. However, appellant fails to provide sufficient grounds to overcome the presumption

of honesty and integrity which accompanies administrative adjudicators. In Re Oliver, 1 MSPB 368 (1980). The presiding official gave proper consideration to appellant's prior disciplinary record. Barbour v. Department of Defense, MSPB Docket No. PH07528110053 (June 22, 1983). Appellant claims the presiding official made numerous errors in his handling of

[Footnote continued on next page.]

the case, and erred in failing to address all the issues requiring resolution. Appellant has not established error by the presiding official or prejudice to his substantive rights. Karapinka v. Department of Energy, 6 MSPB 114 (1981). To the extent the petition for review challenges the presiding official's factual determinations, appellant provides insufficient grounds to overturn the presiding official's findings. Weaver v. Department of the Navy, 2 MSPB 297 (1980). Appellant fails to establish that he was treated in a disparate manner, or that the penalty of removal was inappropriate. Douglas v. Veterans Administration, 5 MSPB 313 (1981). Appellant cannot hold the agency responsible for any possible improper conduct by his own attorney. Cf. Sofio v. Internal Revenue Service, 7 MSPB 493 (1981).

APPENDIX "C"

(Filed: February 22, 1985)

Note: This opinion will not be published in a printed volume because it does not add signifigantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOHN R. CONNOR, Petitioner,	)	
v.	)	
U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, Respondent.	)	Appeal No. 84-1389

DECIDED: February 22, 1985

Before DAVIS, KASHIWA and MILLER, Circuit Judges

PER CURIAM.

DECISION

The decisions of the Merit System Protection Board (MSPB or Board) (Case No. PH07528210388), sustaining petitioner's removal from his position with respondent, are affirmed.

OPINION

Petitioner, a GS-11 Labor Economist with the

Philadelphia office of the Bureau of Labor Statistics (BLS), was removed on charges generally arising out of his use of a government vehicle in December 1981. BLS sustained charges of failing to follow his supervisor's instructions (including directions to return a government vehicle), of misuse of a government vehicle, and of AWOL. Connor appealed to the MSPB which held a hearing. After that hearing, the MSPB presiding official sustained (in a thorough opinion) most of the charges as well as the penalty of removal. The full Board declined review.

We affirm on the basis of the presiding official's comprehensive decision (as supplemented by the decision of the full Board) because we cannot conclude that those decisions are unsupported by substantial evidence on the record as a whole, or are arbitrary, capricious, an abuse of discretion, or are contrary to law, or obtained without procedures required by law, rule or regulation.

In particular, we are satisfied the MSPB permissably held that petitioner (a) intentionally disobeyed supervisory directions, (b) considerably misused a government vehicle for personal business, and (c) took sick leave without proper authority, and that the MSPB also permissibly found that the agency's action against petitioner was not retaliatory for his union activities or the result of bias and prejudice on the part of the agency. We also reject petitioner's contentions that (i) prior disciplinary actions were improperly considered against him, and (ii) the MSPB hearing was not fair and impartial. As for the penalty of removal, a statute (former 31 U.S.C. §638(a), now 31 U.S.C. §1349 (b)) indicates how seriously Congress views misuse of a government vehicle. In this instance, that offense was coupled with direct insubordination. In these circumstances, sustaining the penalty of removal was not an abuse of discretion or improper.[1/]

1/ We have taken full account of petitioner's motion to correct alleged misstatements in the record which has been granted for the purposes of the appeal to this court.

APPENDIX "D"

(Filed: April 5, 1985)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOHN R. CONNOR,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 84-1389
	)	
THE UNITED STATES DEPARTMENT OF LABOR BUREAU OF LABOR STATISTICS,	)	
	)	
Respondent.	)	

O R D E R

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

/s/ George E. Hutchinson
George E. Hutchinson,
Clerk

April 5, 1985
Date

cc: John R. Connor
Richard W. Oehler

APPENDIX "E"

[Handwritten notes of Paul Little]

12/15/81 E/

John Connor

On 12/14 John informed me that his POV had been stolen.

I discussed situation with Frank H. and decided that JC assignment (4 ECI Services) should be given to amother field representative and JC to be given an office assignment.

Frank H. did this. Connor wanted to retain field assignment.

J Connor asked Valerie King to obtain a GSA vehicle for him, which she did.

Frank H. advised Connor that car was not necessary since he did not have a field assignment.

Connor again requested a field assignment.

4:15 pm John Connor returned with GSA vehicle. F. Hayden again advised him that there was no need for the vehicle.

Connor again requested a field assignment.

[2d page]

12/15 AM F. Hayden told John Connor to return the GSA vehicle since there was no need.

Connor replied that why not give him an assignment in the field and further stated that he was not taking the vehicle back to the motor pool. He then went to another field representative's work area and took a field assignment which he was not authorized to do.

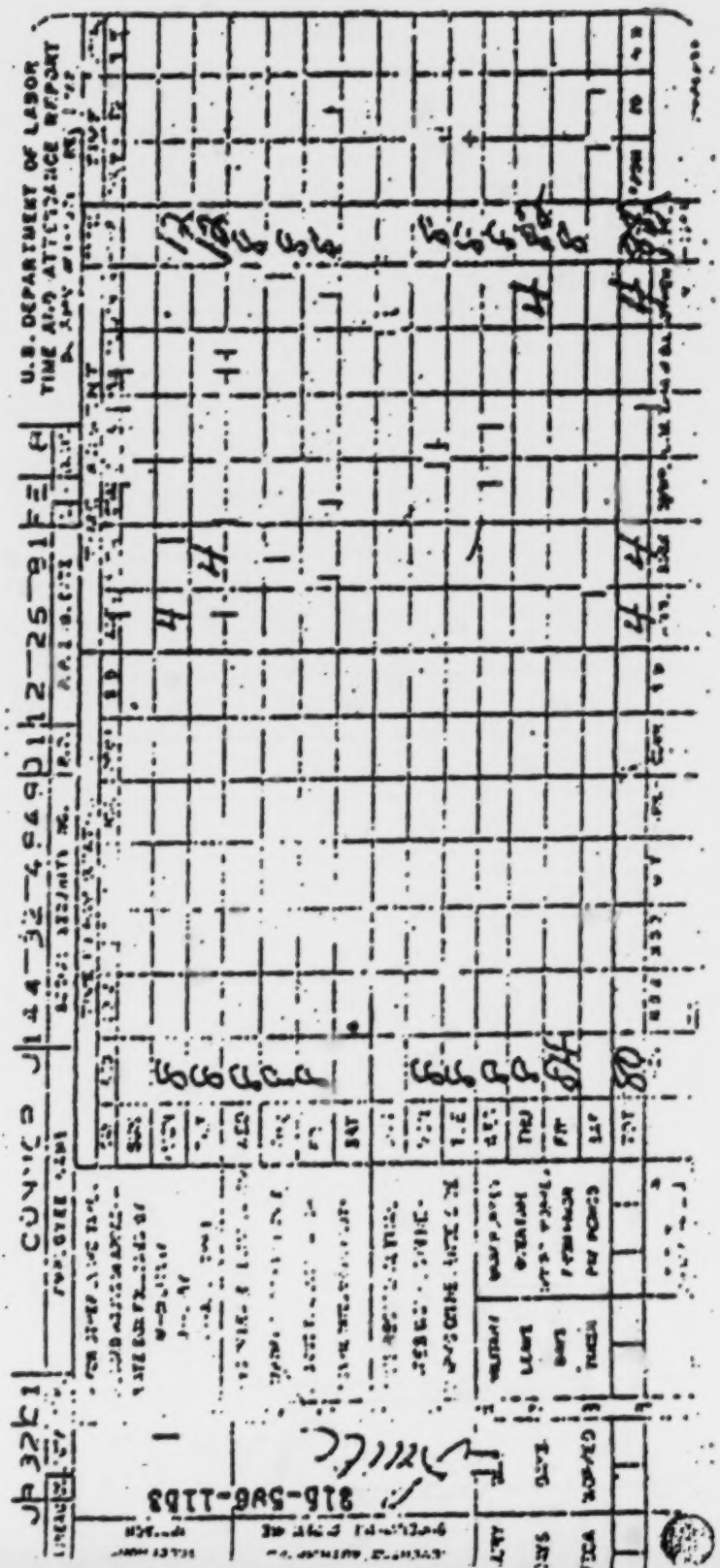
PM Hayden directed Connor to return the car to the Motor pool. Connor stated that he had a Doctor's Appointment which had been scheduled for the morning but which had been rescheduled. He stated that he therefore would not return the vehicle.

/s/ Paul A. Little

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX "F"



APPENDIX "G"

APPENDIX "H"

U.S. Department of Labor

Bureau of Labor Statistics, P. O. Box 13309, Philadelphia, Pennsylvania 19101

Date: January 21, 1982

FILE REF:

SUBJECT: Absence without leave

TO: MR. JOHN CONNOR
Field Representative

This is to advise you that you have been charged with one (1) hour of absence without leave on Monday, December 14, 1981, because of your unauthorized absence from the office when you went to the G.S.A. motor pool to pick up a G.S.A. vehicle. Your time and attendance report has been amended to reflect this fact.

Also, we have reviewed the circumstances of your absence on Tuesday, December 15, 1981. Because of your failure to obtain prior approval of your sick leave request from your supervisor, your time and attendance report has been amended to reflect four (4) hours of absence without leave.

/s/ Paul A. Little
PAUL A. LITTLE
Chief, Branch of Field Activities

Supreme Court, U.S.
FILED
OCT 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-56

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN R. CONNOR, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR,
BUREAU OF LABOR STATISTICS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
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Washington, D.C. 20530
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BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-56

JOHN R. CONNOR, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR,
BUREAU OF LABOR STATISTICS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the decision of the Merit Systems Protection Board (Board) sustaining his removal from employment with respondent was procedurally defective.

1. Petitioner, a former employee of the Bureau of Labor Statistics (Bureau), was removed from his position with the Bureau effective March 5, 1982. The removal was based on charges sustained by the Bureau that petitioner intentionally disobeyed supervisory directions, improperly used a government vehicle for personal use, and took sick leave without proper authority (Pet. App. 1a).

Petitioner appealed his removal to the Merit Systems Protection Board. After a hearing, the Board's presiding official found that the evidence supported the charges (Pet.

App. 3a-23a).[1] The presiding official also rejected petitioner's claims that the Bureau's action against him was retaliatory and a result of unlawful bias; that the Bureau erroneously considered two prior disciplinary actions against him; that the Bureau erroneously interpreted and applied its leave procedures; and that the Bureau's choice of disciplinary action was improper and excessive (*id.* at 23a-51a). The MSPB denied petitioner's request to review the presiding official's decision (*id.* at 55a-57a).

The court of appeals affirmed in an unpublished opinion (765 F.2d 160 (Table)) "on the basis of the presiding official's comprehensive decision (as supplemented by the decision of the full Board)" (Pet. App. 59a). The court could not "conclude that those decisions are unsupported by substantial evidence on the record as a whole, or are arbitrary, capricious, an abuse of discretion, or are contrary to law, or obtained without procedures required by law, rule or regulation" (*ibid.*). See 5 U.S.C. 7703(c).

2. Petitioner asserts that the Board's proceedings were procedurally defective in three respects and that the case should be remanded. The court of appeals correctly rejected petitioner's fact-bound contentions, and its unpublished decision does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

a. Petitioner first contends (Pet. 20-32) that the absence of his second-level supervisor, Paul A. Little, from the hearing prevented a full disclosure of the facts and deprived him of due process.[2] Petitioner suggests that Little *might*

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[1]All three charges were sustained, though the presiding official did decline to sustain one allegation of a particular instance of insubordination and absence without leave (Pet. App. 9a-15a).

[2]The Board hearing commenced on June 21, 1982. Little was out of the country on vacation from June 20 to July 5, 1982.

possess knowledge that *might* tend to confirm petitioner's claims of retaliation and bias (Pet. 25, 29-31).[3] Petitioner's assertions are pure conjecture; the presiding official, on the other hand, found explicitly that "no evidence" supported petitioner's claim of retaliation (Pet. App. 28a) and that petitioner failed to show bias on the part of any Bureau official (*id.* at 39a). Although Little was absent from the hearing, numerous Bureau officials attended and testified, including petitioner's first-level supervisor, Frank Hayden, petitioner's third-level supervisor, Irwin Fiegenbaum, and the Bureau's Regional Commissioner, Alvin Margolis. The presiding official found that the testimony of these Bureau officials was sufficient, as well as competent and credible (see, *e.g.*, *id.* at 27a, 46a-47a); at some point, the presiding official must be able to decide that additional evidence on an issue would be cumulative, irrelevant, or dilatory (Hearing Tr. 405-411). Finally, petitioner knew well in advance of the hearing that Little would not be available (Pet. 15-16) and could have deposed him before he left, 5 C.F.R. 1201.71-1201.75 (1982), but did not attempt to do so.[4]

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[3]Petitioner also seems to claim that Little's testimony could have had some bearing on whether petitioner took sick leave without proper authority (Pet. 14-17, 25, 29-30), but the Board's findings (Pet. App. 17a-18a, 23a, 33a-37a) refute this speculation. In any event, since the only issue in this regard raised by petitioner is the meaning of an FPM letter (see pages 4-5, *infra*), Little's testimony would have been irrelevant.

[4]The petition (at 16) quotes a letter from petitioner's counsel to the presiding official on June 10, 1982, to the effect that the government said at some point that a "deposition at some later date" might be feasible. The petition does not elaborate on this alleged representation, however, and the letter argued against a deposition. Moreover, the government made clear on June 14 that it was willing to make the witness available for a deposition (Little did not leave until June 20). Appellant's Br. (at 92A). It is, of course, up to each side to handle the presentation of its evidence, and it is not the government's fault if, at a later date, the presiding official decided that the proceedings should not be further postponed for a witness with nothing to add.

Petitioner presents no credible evidence that the court of appeals or the Board erred, and his request to reopen the factual record at this late stage should be rejected. There is no reason to suppose that petitioner's fishing expedition with Little would produce any new, material evidence, particularly in light of the accumulated evidence already in the record belying his charge of bias or retaliation.[5]

b. Petitioner next contends (Pet. 32-36) that, because sick leave originally was entered on his time and attendance card for December 15, 1981, the Bureau violated FPM [Federal Personnel Manual] Letter 630-29 (Jan. 28, 1981) when it later changed petitioner's status to absence without leave. As the presiding official observed, however, FPM Letter 630-29 is relevant only "[w]hen leave has been requested, approved, and used" (Pet. App. 34a, 35a). Petitioner never requested, and his supervisors did not give their required prior approval to, four hours of sick leave on December 15, 1981. Rather, petitioner engaged in the "arrogant presumptuous tactic [of] telling his supervisor [that] * * * he [already] was on sick leave * * *" (*id.* at 36a-37a).[6] This, stated the presiding official, "was a violation of the spirit and intent, if not the letter, of the sick leave

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[5]None of the cases cited at Pet. 20-32 applies to a situation like that here, where the evidence in the record is already sufficient to support the agency's action and there is little likelihood that hearing an additional witness would do anything but delay resolution of the case.

[6]Petitioner apparently contends (Pet. 32-33) that his absence should be presumed approved anyway since, he argues, FPM Letter 630-29 appears to require such a presumption once the leave has been so recorded. But whether or not the Bureau made such a post hoc — and apparently accidental — "approval" does not change the fact that, as the presiding official found, petitioner violated the Bureau's established practice of having sick leave approved and requested beforehand. The FPM Letter is relevant to how leave should be recorded, not to whether its taking evidences a disciplinary breach, which is the issue here. In any event, the Letter would not supersede agency practice; its preamble makes clear that it is intended only to provide guidance to the agencies.

OPM [Office of Personnel Management] authority [that petitioner] cites * * *" (*id.* at 37a).[7] The full Board and the court of appeals agreed (*id.* at 57a, 60a).[8]

c. Petitioner's final contention (Pet. 37-41) is that the Board erred in failing to interpret a bargaining unit agreement to resolve whether the Bureau properly considered two instances of prior disciplinary action. The Board correctly rejected this argument (Pet. App. 28a-33a). As the presiding official observed, the general rule is that past disciplinary actions may be taken into account in establishing an appropriate penalty if the following criteria are satisfied: (1) the employee was informed of the action in writing; (2) the action was a matter of record; and (3) the employee was given an opportunity to dispute the action by having it reviewed by an authority other than the one that took the action (*id.* at 29a). These criteria were met here (see

---

[7]Common sense compels the conclusion that petitioner's interpretation of sick leave policy must be rejected. An employee simply cannot escape the consequence of his misconduct by relying on FPM Letter 630-29. As the Bureau's Assistant Regional Commissioner explained at the Board hearing, numerous Bureau employees are often in travel status. The time and attendance cards for these employees are routinely filled in based on the employees' representations. If it later is learned that the cards are incorrect, they are amended. Here, the Bureau accepted petitioner's representation that he was on sick leave — which required prior approval — until it had an opportunity to review the validity of the entry. The Bureau's review revealed that the sick leave for December 15, 1981, should be amended to reflect absence without leave. Cf. FPM Letter 630-29 ("An exception to [the rule that petitioner seeks to invoke] is the situation where it is subsequently established that the employee submitted fraudulent documentation or misrepresented either the time taken or the reason for the absence"; here, petitioner implied that his sick leave had been approved in advance when it had not).

[8]Moreover, even if petitioner were correct on his second contention, it would not follow that a different sanction would have been imposed. Petitioner would still have been insubordinate and would still have misused the car, and either would justify his removal.

id. at 32a). Petitioner had the opportunity to dispute the earlier disciplinary actions, but admitted that he did not avail himself of it. As the presiding official remarked, "[W]here [petitioner] is advised of his appeal route and he elects to challenge the agency by ignoring their advice and proceeding independently, based on his individual interpretation of the laws, rules, regulations, and contract, he cannot succeed in alleging harmful error if the result is not to his liking" (*id.* at 32a). In any event, it was inappropriate for petitioner to wait until the Board proceeding to pursue his theory of the bargaining agreement with regard to the earlier disciplinary actions. Thus, it is immaterial whether petitioner's "interpretation" of the bargaining agreement was correct.

In sum, four separate reviewing authorities have found that petitioner's dismissal was justified. His fact-bound arguments deserve no further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

OCTOBER 1985

DOJ-1985-10

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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MERIT SYSTEMS PROTECTION BOARD,
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Respondents.

REPLY TO MEMORANDUM OF RESPONDENT IN OPPOSITION

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REPLY TO MEMORANDUM
OF RESPONDENT IN OPPOSITION

---

1. Petitioner herein replies to the Memorandum filed by the Solicitor General on behalf of Respondent U. S. Department of Labor in this matter. Petitioner particularly notes that

Respondent's Memorandum is singularly devoid of any citations to controlling and/or persuasive authority in support of its arguments. Its document consists basically of "commentary" on the constitutional arguments advanced in Petitioner's brief.

2. Contrary to Respondent's assertion that the decision of the Court of Appeals "does not conflict with any decision of this Court or any other court of appeals" (Mem. 2, ¶3), Petitioner restates his arguments that the decision conflicts, inter alia, with the Supreme Court's decision in Vitarelli v. Seaton, 359 U.S. 535 (1959), as well as the several cases cited by Petitioner on the issue of administrative due process.

a. Respondent argues that Petitioner's sole reason for attempting to secure testimony from Paul Little is that Little could "confirm petitioner's claims of retaliation and bias." (Mem. 3, ll. 2-3). (Emphasis added). To the contrary, Petitioner's main argument on this issue has to

do with Petitioner's defense of arbitrariness, in violation of 5 U.S.C. §7703(c)(1) (see: Pet. 25,31) and failure to follow agency leave regulations (FPM Letter 630-29), in violation of 5 U.S.C. &7703(c)(2). (Pet. 33-36).

The record demonstrates conclusively that Little knew all there ever was to know about the GSA car issue at the time it occurred on December 14,15,16th, 1981, as evidenced by his own handwritten notes. (Pet. App. E, 62-63a). In other words, Little's originally-approved Sick Leave entry for December 15, 1981 was made with full knowledge of all the facts and circumstances. The factual predicate with respect to Petitioner's use of the GSA car was completed when Little signed Petitioner's Time and Attendance Report for the Pay Period ending 12/26/81. Testimony from Paul Little, by establishing that his "review" of the "circumstances of [Petitioner's] absence on Tuesday, December 15, 1981" (Pet. App. H, 66a) was based on the identical set of facts and circumstances he possessed

when he initially approved Petitioner's sick leave, would establish an "arbitrary" personnel action, in violation of 5 U.S.C. §7703(c)(1). (Unless Little were to admit that Petitioner's January 6, 1982 invocation of arbitration in the Coleman grievance prompted the January 21, 1982 "review".) Some unexpected development obviously caused the review, which is defined as "[a] reconsideration; second view or examination; revision." Black's Law Dictionary, 5th ed. (1979), at 1186.

References to Paul Little were perpetual throughout the testimony of Frank Hayden (Petitioner's immediate supervisor) at the MSPB hearing on June 21, 1982:

> "Late in the morning I got a a call from Paul Little who informed me..." (T. 69, l. 13)
>
> "...after I had come back from lunch I talked to Paul Little." (T. 70, l. 23)
>
> "...I would say approximately 1:30 when I talked to Paul Little." (T. 71, l. 22)
>
> "I also decided I should call Paul Little * * * I called Paul * * * Paul said..." (T. 74, ll. 11-17)

"...it was my belief that field representatives are to go through Paul Little to get a GSA car." (T. 75, l. 15)

"Around 8:25 a.m. I got a call from Paul Little telling me that..." (T. 77, l. 21)

"I went to call Paul Little. I told him..." (T. 78, l. 22)

"While I was talking to Mr. Little..." (T. 79, l. 5)

"...while I was on the phone to Paul Little..." (T. 79, l. 14)

"...and I got back on the phone to tell Paul Little what was happening." (T. 80, l. 20)

"When I finished with Paul Little..." (T. 81, l. 1)

"I went down to see Irwin Feigenbaum and Paul Little about what had been transpiring." (T. 81, l. 11)

"I believe I called Paul Little to tell him what John's reaction was..." (T. 82, l. 14)

"Irwin Feigenbaum and Paul Little had contacted our labor management people and they said..." (T. 85, l. 12)

"Well, John left and I called Paul Little to tell him what had happened..." (T. 86, l. 23)

Numerous references to Paul Little were also made by Witness Irwin Feigenbaum in his testimony on June 21, 1982 (see: Transcript, pp. 108, 109, 110, 111 and 112). Consequently, with respect to Paul Little, we are talking about a principal

participant in the events of December 14,15,16th-not any bystander. He literally - as well as telephonically - directed his subordinate Frank Hayden during the GSA episode. And as the management official who first approved and then later reversed Petitioner's leave entries for December 14 and 15, 1981, he is also the architect of the critical management decisions that created the administrative basis for Feigenbaum's removal proposal on January 28, 1982. In fact, Little is a "but for" type of witness, which is to say: without the critical AWOL entry of 4 hours on the afternoon of December 15th, Petitioner could not be accused of "insubordination" if he was legitimately on "approved" Sick Leave when he was allegedly required to return the GSA car to the motor pool. Consequently, evidence from Little is necessary "for a full and true disclosure of the facts" in this matter. 5 U.S.C. §556(d).

Respondent further erroneously states that "Petitioner knew well in advance of the hearing that Little would not be available * * * and

could have deposed him before he left * * * but did not attempt to do so." (Mem. 3). The fact of the matter is that Petitioner only learned of Little's impending departure for Latin America on or about June 15, 1982, less than 5 days before his June 20th departure date. There was no opportunity for scheduling a deposition on such short notice[1] however Petitioner immediately moved for a continuance of the MSPB hearing date to July 15, 1982 (see: A 94-127A). The request was denied. The confrontation and cross-examination of Little that Petitioner is seeking is that which occurs at a "full trial-type hearing," K. Davis, Administrative Law Treatise §12:9 at 445 (1979), "...under conditions where his demeanor as a witness can be observed." (A 124A) (emphasis in original).

b. In its Memorandum, Respondent attempts to argue that the Bureau's approval of Petitioner's leave (4 hours Sick Leave on December 15th) was "apparently accidental." (Mem. 4, n. 6). And

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[1] Little was in Philadelphia; Petitioner was in North Jersey; and Petitioner's attorney was in Baltimore, Md.

even though critical evidence on this issue was most unfortunately omitted from the MSPB hearing, the June 21, 1982 testimony of Irwin Feigenbaum established unequivocally that the initial leave approval was far from being "accidental":

> ...but the initial submission to the secretary was to honor his sick leave, if you will, on the time card. (Emphasis added)

(T. 118, ll. 2-3). Consequently, the conclusion is inescapable: B.L.S. management, in the person of Paul Little, made a conscious, affirmative decision to "approve" Petitioner's Sick Leave Request for 4 hours on December 15, 1981, in accordance with FPM Letter 630-29. And in the absence of fraud or misrepresentation, the initial approval must stand. FPM Letter 630-29. It is well settled in administrative law that "reasonable regulations promulgated pursuant to statutory authority have the force and effect of law." Pearce v. Director, Office of Workers' Compensation, 647 F.2d 716, 726 (C.A. 7, 1981). An agency is bound by its own regulations.

Whelan v. United States, 529 F.2d 1000 (Ct. Cl. 1976). The Supreme Court, moreover, has further found that where an adverse personnel action has been carried out in substantial violation of procedural Regulations, it is nothing less than a void action, and the employee is entitled to recover his pay. Service v. Dulles, 354 U.S. 363 (1957).

. . . . .

Respondent further erroneously states that "...petitioner implied that his sick leave had been approved in advance when it had not." (Mem. n.7). The fact of the matter is that Petitioner has at all times taken the position that he was only required to give "notice" of sick leave to his supervisor (see: Transcript, June 25, 1982, p. 403, ll. 22-23), which position is in accordance with FPM 630, Subch. 4, Sec. 4-2c(2)(a):

> Absence for Examination or Treatment
> (a) NCFLL Bargaining unit employees: Employees are to inform their supervisors of absences for * * * medical examination or treatment in advance if possible. . .

(Agency Exhibit 5, A 35E). Petitioner's argument is that "approval" was lawfully effected when Little signed his Time and Attendance Report containing 4 hours of Sick Leave in the "approved" column for the Pay Period ending December 26, 1981. And Petitioner finally contends that Little's action in changing the Sick Leave to AWOL on January 21, 1982 constituted a failure to follow agency leave regulations, in violation of 5 U.S.C. §7703(c)(2).

3. With respect to the issue of Agency use of two, prior, unreviewed disciplinary actions to enhance the penalty, Respondent erroneously states that "[p]etitioner had the opportunity to dispute the earlier disciplinary actions, but admitted that he did not avail himself of it." (Mem. 6, ll. 1-3). Very much to the contrary, Petitioner's argument makes explicit his contention that the general rule established in Bolling v. Department of the Air Force, MSPB Order N° NY07528090034 (1981) (the employee was given an opportunity to dispute the action by having it reviewed by an authority other than

the one that took the action), cannot lawfully be applied to Petitioner who was a union-covered employee with contractual rights of review for disciplinary actions. (Pet. 37-41). It, of course, cannot be gainsaid that any "opportunity to dispute the action" must be a lawful opportunity. Petitioner maintains that, under Articles 13 and 15 of the N.C.F.L.L. contract, he was entitled to both grieve the 1980 (3-day) suspension as well as arbitrate the 1981 (15-day) suspension, the N.C.F.L.L., itself, having commenced both procedures on Petitioner's behalf. (See: Appellant's Exhibit 9 and Agency Exhibit 2, attached). Even the MSPB Hearing Officer, in commenting on the 15-day suspension, stated:

> "I think you are right when you say there is an alternate route."

T. 55, ll. 12-14.

. . . . .

Respondent's statement that "...it was inappropriate for petitioner to wait until the Board

proceeding to pursue his theory of the bargaining agreement with regard to the earlier disciplinary actions" (Mem. 6) is so obviously in error that one may conclude that the author of the "Memorandum" has not reviewed the voluminous evidence introduced in the record on this issue.

The Government brought in Mr. Robert Hastings, Director of the Office of Labor-Management Relations as its "expert" on the N.C.F.L.L. contract and the Civil Service Reform Act of 1978. (See: June 21, 1982 Transcript, pages 19-37 direct; pages 49-58 cross). Petitioner also testified on the issue. (See: June 25, 1982 Transcript, 309-321 direct). Numerous exhibits were introduced by both sides on the issue. (See: Agency Exhibits 1,2, and 3; Appellant's Exhibits 6,7,8 and 9; plus Joint Exhibit 1). These exhibits establish beyond a doubt that Petitioner had not only vigorously "disputed" both suspensions from their inception but also they provide ample evidence in the record for the Hearing Officer to have decided the critical Question of whether

"Petitioner had correctly utilized negotiated grievance procedures in seeking review of two suspensions which were later used in determining a removal penalty." (Pet. 2). Particularly relevant are Appellant's Exhibit 8, entitled: Changes Made to DLS 752 To Comply With The Civil Service Reform Act of 1978 (CSRA), Office of Personnel Management (OPM) Regulations and Current Department of Labor Regulations and Organization:

> "5-10i(2)(g) Adverse Decisions - This subsection has been revised to provide for an employee's grievance rights in cases of suspensions for 14 days or less. (DLS 771, Article VI, Local 12 Contract, Article 15, NCFLL Contract)."(Emphasis added).

(E 70E), and Agency Exhibit No. 1, a letter dated May 9, 1980 from Regional Commissioner Alvin I. Margulis to Petitioner, which states:

> "...The Department does not agree with your interpretation - Article 13, Section 3 of the agreement states: * * * If the final written decision provided for in Section 2 of this Article involves a suspension of 30 calendar days or less, the matter may be appealed directly to arbitration * * *" (Emphasis added)

(E 5E). The first exhibit confirms Petitioner's

position that he was correct in grieving the 3-day suspension and the second exhibit directly supports his invocation of arbitration for the 15-day suspension.

. . . . . .

The failure of the Agency to correctly inform Petitioner of his dual appellate remedies in its decision letters (A 13A, 18A) violated Petitioner's due process rights under 5 U.S.C. §7121(e)(1) and FPM Chapter 752, Subch. 3-3k(2).

A decision by the MSPB Hearing Officer on the legal issue of whether Petitioner had correctly utilized N.C.F.L.L. negotiated grievance procedures in seeking review of the 1980 and 1981 suspensions was required not only because the issue was relevant to the severity of the penalty imposed but also because the contract issue was a "material" issue of law "presented in the record." 5 U.S.C. §557(c)(3)(A); 5 C.F.R. §1201.111(b)(1). See: K. Davis, Administrative Law Treatise §14.27 at 125.

Had the MSPB decided the contractual issue even erroneously, Petitioner would have been entitled to full judicial review of same because "[d]ecisions of officers of the administrative departments of the Federal government upon questions of law do not conclude the courts, and they have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by department officers." American School v. McAnnulty, 187 U.S. 94 (1902). An order may not stand if the agency has misconceived the law. Securities & Exch. Commission v. Chenery Corp., 318 U.S. 80 (1943).

In this case, however, we are confronted with the stated refusal of the MSPB Hearing Officer to decide the NCFLL contract issue. The Ninth Circuit has held that the "absence of required findings is fatal to the validity of an administrative decision regardless of whether there may be in the record evidence to support proper findings." Anglo-Canadian Shipping Co. v. Federal Maritime Commission, 310 F.2d 606, 617

(C.A. 9, 1962). Accord: Brotherhood of Maintenance of Way Emp. v. U.S., 221 F.Supp. 19, affirmed 375 U.S. 216 (D. C. Mich. 1963).

The Due Process claims presented in this Petition have been extensively argued by Petitioner since the inception of this matter. (In fact, Petitioner's Petition for Rehearing in the Court of Appeals was devoted exclusively to the issue of "missing" Witness Paul Little.) During this period, Petitioner endured official concern for the rights and privileges of others (Presiding Official Butler: "...he's away on vacation and I hesitate to delay... " T. 408, ll. 23-24) while suffering pointed disregard for his own defenses (Presiding Official Butler: "Setting aside appellant's argument that I interpret the bargaining unit agreement... " Pet. 31a, ll. 24-28), to the extreme prejudice of of those defenses.

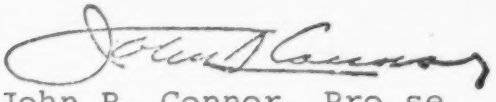
The critical "gaps" in this matter are of such magnitude that they could only properly be

closed by a remand.

CONCLUSION

For the reasons hereinabove stated, in reply, together with those arguments contained in his Petition for Certiorari, Petitioner requests that the Supreme Court issue its Writ of Certiorari in this matter.

Respectfully submitted,



John R. Connor, Pro se

November 11, 1985

(Appellant's Ex. 9)

Mr. I.L. Feigenbaum
A.R.A. B.L.S.
U.S. Department of Labor
3535 Market St.
Phila. Pa. 19104

Re: Connor J.R.

Dear Sir:

Be advised I have been requested to represent the above captioned individual with a possible grievance.

I request a meeting with you in an effort to resolve this issue at the informal (first step). I here by request that you stay all potential action.

Advise me as to a mutually convenient time and place for said meeting.

Sincerely,

/s/ Edward F. Donnelly

February 25, 1980

Edward F. Donnelly
Ex. V.P. Lu 644
22 No. Penna Av
Wilkes Barre, Pa 18702

cc: Connor
file

[Handwritten note]

John
Prior to a (or the) meeting you & I will get together. I'll advise you as soon as I hear from Feig.

Regards,

Ed

71E

(Agency Ex. 2)

327 Delaware Avenue
West Pittston, Pa. 18643
21 April, 1981

Mr. Robert H. Hastings,
Director, Office of Labor-
Management Relations, OASAM
Room S1313
200 Constitution Avenue, N.W.
Washington, D. C. 20210

Re: Request for Arbitration

Dear Mr. Hastings:

In accordance with Art. 13, Sec. 3(B), N.C.F.L.L. Agreement, I herein invoke Art. 16 arbitration in the matter of the 3-week suspension from duty of JOHN R. CONNOR, U. S. Department of Labor, Bureau of Labor Statistics, Philadelphia, Pa., which suspension commenced 20 April, 1981.

Furthermore, in accordance with Art. 15, Sec. 11(A) I request that a "stay" be issued so that JOHN R. CONNOR can return to duty immediately.

Sincerely,

/s/ Edward F. Donnelly

EDWARD F. DONNELLY, Exec.V.P.
N.C.F.L.L., Local No. 644

cc: Mr. Howard Butler, President
NCFLL, AFGE, AFL-CIO, Room 1105, Federal Building, Dover, Delaware

Mr. Al Margulis, Regional Commissioner
U.S. Department of Labor - B. L. S.
P. O. Box 13309
Philadelphia, PA. 19101